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United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9595

CARL ALDO MARZANI, ALIAS TONY WHALES,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court of the United States for the District of Columbia

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JOINT APPENDIX TO BRIEFS

PLEADINGS, DOCKET ENTRIES AND OTHER PAPERS

1172 G. J. Original

Criminal No. 48-47

Title 18, Section 80, U. S. C.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

THE UNITED STATES OF AMERICA

v.

CARL ALDO MARZANI,
alias TONY WHALES.

THE DISTRICT OF COLUMBIA, SS:

JANUARY TERM A. D. 1947

The Grand Jurors of the United States of America, duly impaneled and sworn to inquire within and for the District of Columbia and now attending the said Court upon their oaths present:

That on or about the twenty-ninth day of July in the year 1942 at Washington in the District of Columbia and within the jurisdiction of this Court;

CARL ALDO MARZANI,
alias TONY WHALES,

the defendant herein, whose more full, true and correct name is to the Grand Jurors unknown and who on and after March 7, 1942 was employed on a temporary basis subject to a character and fitness investigation, by the Office of the Coordinator of Information and by its successor, the Office of Strategic Services, both of which offices were agencies of the United States having jurisdiction of matters

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concerning the security and welfare of the United States during a period of war, and who, in a civilian capacity, was so employed (by the Office of Strategic Services) on or about July 29, 1942, did wilfully, unlawfully, and feloniously made a false and fraudulent statement and representation in a matter within the jurisdiction of the Federal Bureau of Investigation, an agency of the United States,
1173 said matter being an investigation of the character and fitness of said CARL ALDO MARZANI for employment by the Office of the Coordinator of Information and the Office of Strategic Services, which said investigation was conducted by the said Federal Bureau of Investigation pursuant to a request by the said Office of the Coordinator of Information under the authority of statutes, rules and regulations of the United States, and executive orders of the President of the United States; that is to say;

That on or about July 29, 1942, in the city and district aforesaid, in response to a question propounded by a duly authorized agent of the said Federal Bureau of Investigation during the course of and pursuant to the aforesaid character and fitness investigation, the said CARL ALDO MARZANI falsely stated and represented that he had never been a member of the Communist Party, which said statement and representation was false and fraudulent in this, to-wit; that the said CARL ALDO MARZANI was in fact a member of the said Communist Party (Sixth Assembly District, New York, New York) during the years 1940 and 1941, all of which was well known to the said defendant at the time he made the aforesaid false and fraudulent statement and representation.

Contrary to the statute in such cases made and provided (Section 80, Title 18 U. S. C.) and against the peace and dignity of the United States of America.

COUNT II.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present;

That on or about the twenty-ninth day of July in the

year 1942 at Washington in the District of Columbia and within the jurisdiction of this Court;

CARL ALDO MARZANI,
alias TONY WHALES,

the defendant herein, whose more full, true and correct name is to the Grand Jurors unknown and who on
1174 and after March 7, 1942 was employed, on a temporary basis subject to a character and fitness investigation, by the Office of the Coordinator of Information and by its successor, the Office of Strategic Services, both of which offices were agencies of the United States having jurisdiction of matters concerning the security and welfare of the United States during a period of war, and who, in a civilian capacity, was so employed (by the Office of Strategic Services) on or about July 29, 1942, did wilfully, unlawfully, and feloniously make a false and fraudulent statement and representation in a matter within the jurisdiction of the Federal Bureau of Investigation, an agency of the United States, said matter being an investigation of the character and fitness of said CARL ALDO MARZANI for employment by the Office of the Coordinator of Information and the Office of Strategic Services, which said investigation was conducted by the said Federal Bureau of Investigation pursuant to a request by the said Office of the Coordinator of Information under the authority of statutes, rules and regulations of the United States, and executive orders of the President of the United States; that is to say;

That on or about July 29, 1942, in the city and district aforesaid, in response to a question propounded by a duly authorized agent of the said Federal Bureau of Investigation during the course of and pursuant to the aforesaid character and fitness investigation, the said CARL ALDO MARZANI falsely stated and represented that he had never attended any meetings of the Communist Party, which said statement and representation was false and fraudulent in this, to-wit; that the said CARL ALDO

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MARZANI did, in fact, attend meetings of the Communist Party in the City of New York, New York, on or about the following dates, to-wit; July 22, 1940, July 23, 1940, August 12, 1940, September 3, 1940, October 14, 1940, October 17, 1940, November 25, 1940, December 2, 1940, December 9, 1940, February 11, 1941, February 22, 1941, May 28, 1941, September 22, 1941, and at various other
1175 times, all of which was well known to the said CARL ALDO MARZANI at the time he made the aforesaid and fraudulent representation.

Contrary to the statute in such cases made and provided (Section 80, Title 18 U. S. C.) and against the peace and dignity of the United States of America.

COUNT III.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present;

That on or about the twenty-ninth day of July in the year 1942 at Washington in the District of Columbia and within the jurisdiction of this Court;

CARL ALDO MARZANI,
alias, TONY WHALES,

the defendant herein, whose more full, true and correct name is to the Grand Jurors unknown and who on and after March 7, 1942 was employed, on a temporary basis subject to a character and fitness investigation, by the Office of the Coordinator of Information and by its successor, the Office of Strategic Services, both of which offices were agencies of the United States having jurisdiction of matters concerning the security and welfare of the United States during a period of war, and who, in a civilian capacity, was so employed (by the Office of Strategic Services) on or about July 29, 1942, did wilfully, unlawfully, and feloniously make a false and fraudulent statement and representation in a matter within the jurisdiction of the Fed-

eral Bureau of Investigation, an agency of the United States, said matter being an investigation of the character and fitness of said CARL ALDO MARZANI for employment by the Office of the Coordinator of Information and the Office of Strategic Services, which said investigation was conducted by the said Federal Bureau of Investigaiton pursuant to a request by the said Office of the Coordinator of Information under the authority of statutes, rules and regulations of the United States, and executive orders of the President of the United States; that is to say;

1176 That on or about July 29, 1942, in the city and district aforesaid, in response to a question propounded by a duly authorized agent of the said Federal Bureau of Investigation during the course of and pursuant to the aforesaid character and fitness investigation, the said CARL ALDO MARZANI falsely stated and represented that he had never contributed any services to the Communist Party, which said statement and representation was false and fraudulent in this, to-wit; that during the years 1940 and 1941, at divers times and places in the City of New York, New York, the said CARL ALDO MARZANI did, in fact, contribute various services to the said Communist Party among which were the following;

(a) Serve as Branch Organizer (Branch F. 2), Sixth Assembly District, and as Section Educational Director in the Sixth Assembly District;

(b) Deliver lectures to Communist Party recruit classes on the principles of communism.

(c) Issue and collect Communist Party membership books;

(d) Compose, edit, publish and distribute pamphlets in the interest and on behalf of the Communist Party.

(e) Counsel and advise Communist Party members and recruits with respect to methods and means to be employed in infiltrating divers groups and societies for the purpose of creating Communist Front organizations.

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(f) Urge Communist Party members to protest to their Congressmen against the passage of an anti-strike bill.

(g) Instruct Communist Party members to obtain recruits for the said Party.

(h) Counsel and instruct Communist Party members to sow resentment and discontent among Negroes by agitating the question of racial discrimination, to the end that members for said Party might thus be recruited.

1177 (i) Urge Communist Party members to attend study classes to the end that they might improve their knowledge of the doctrines and methods of the said Party.

(j) Distribute among Communist Party members tickets to a showing of the Soviet film "Great Beginning."

(k) In the capacity of Branch Organizer (Branch F. 2 of the Sixth Assembly District) of the said Communist Party, counsel and instruct divers Party members concerning a plan, policy and program of the said Party having for its purpose (1) disintegration of the morale of Military Forces of the United States; (2) teaching the principles of communism to men in said Military Forces; and (3) recruiting members for the Communist Party from the ranks of said Military Forces, to the end that the Communist Party might gain control thereof and thus bring about a revolt against the Capitalist System;

all of which was well known to the said defendant at the time he made the aforesaid false and fraudulent statement and representation.

Contrary to the statute in such cases made and provided (Section 80, Title 18 U. S. C.) and against the peace and dignity of the United States of America.

COUNT IV.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present;

That on or about the twenty-ninth day of July in the year 1942 at Washington in the District of Columbia and within the jurisdiction of this court;

1178 CARL ALDO MARZANI,
alias TONY WHALES,

the defendant herein, whose more full, true and correct name is to the Grand Jurors unknown and who on and after March 7, 1942 was employed, on a temporary basis subject to a character and fitness investigation, by the Office of the Coordinator of Information and by its successor, the Office of Strategic Services, both of which offices were agencies of the United States having jurisdiction of matters concerning the security and welfare of the United States during a period of war, and who, in a civilian capacity, was so employed (by the Office of Strategic Services) on or about July 29, 1942, did wilfully, unlawfully, and feloniously make a false and fraudulent statement and representation in a matter within the jurisdiction of the Federal Bureau of Investigation, an agency of the United States, said matter being an investigation of the character and fitness of said CARL ALDO MARZANI for employment by the Office of the Coordinator of Information and the Office of Strategic Services, which said investigation was conducted by the said Federal Bureau of Investigation pursuant to a request by the said Office of the Coordinator of Information under the authority of statutes, rules and regulations of the United States, and executive orders of the President of the United States; that is to say;

That on or about July 29, 1942, in the city and district aforesaid, in response to a question propounded by a duly authorized agent of the said Federal Bureau of Investigation during the course of and pursuant to the aforesaid character and fitness investigation, the said CARL ALDO MARZANI falsely stated and represented that he had never participated in any of the activities of the Communist Party, which said statement and representation, as the defendant then and there well knew, was false and fraudulent in this, to-wit; that during the years 1940 and 1941 at divers times and places in the City of New York, New York,

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1179 the said CARL ALDO MARZANI did, in fact, participate in activities of the said Party as alleged in subparagraphs (a) to (k), inclusive, in count three of this indictment, which said subparagraphs are hereby realleged and by reference incorporated herein.

Contrary to the statute in such cases made and provided (Section 80, Title 18 U. S. C.) and against the peace and dignity of the United States of America.

COUNT V.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present;

That on or about the twenty-third day of November in the year 1942 at Washington in the District of Columbia and within the jurisdiction of this Court;

CARL ALDO MARZANI,
alias TONY WHALES,

the defendant herein, whose more full, true and correct name is to the Grand Jurors unknown and who on and after March 7, 1942 was employed, on a temporary basis subject to a character and fitness investigation, by the Office of the Coordinator of Information and by its successor, the Office of Strategic Services, both of which offices were agencies of the United States having jurisdiction of matters concerning the security and welfare of the United States during a period of war, and who, in a civilian capacity, was so employed (by the Office of Strategic Services) on or about November 23, 1942, did wilfully, unlawfully and feloniously make a false and fraudulent statement and representation in a matter within the jurisdiction of the Civil Service Commission, an agency of the United States, said matter being an investigation of the character and fitness of the said CARL ALDO MARZANI for employment by the Office of the Coordinator of Infor-

mation and the Office of Strategic Services which
1180 said investigation was conducted by the said Civil Service Commission pursuant to a request by the said Office of the Coordinator of Information under the authority of statutes, rules and regulations of the United States, and executive orders of the President of the United States; that is to say;

That on or about November 23, 1942, in the city and district aforesaid, in response to a question propounded by a duly authorized representative of the said Civil Service Commission during the course of and pursuant to the aforesaid character and fitness investigation the said CARL ALDO MARZANI falsely stated and represented that he had never used the name or been known as TONY WHALES, and that he had never used or been known by any similar name, which said statement and representation was false and fraudulent in this, to-wit; that the said CARL ALDO MARZANI had, in fact, adopted and used the name TONY WHALES, was known by said name in the Communist Party and under the same name was a member and worker in the said Party in New York City during the years 1940 and 1941, all of which was well known to the said defendant at the time he made the aforesaid false and fraudulent statement and representation.

Contrary to the statute in such cases made and provided (Section 80, Title 18, U. S. C.) and against the peace and dignity of the United States of America.

COUNT VI.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present;

That on or about the twenty-third day of November in the year 1942 at Washington in the District of Columbia and within the jurisdiction of this Court;

CARL ALDO MARZANI,
alias TONY WHALES,

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1181 the defendant herein, whose more full, true and correct name is to the Grand Jurors unknown and who on and after March 7, 1942 was employed on a temporary basis subject to a character and fitness investigation, by the Office of the Coordinator of Information and by its successor, the Office of Strategic Services, both of which offices were agencies of the United States having jurisdiction of matters concerning the security and welfare of the United States during a period of war, and who, in a civilian capacity, was so employed (by the Office of Strategic Services) on or about November 23, 1942, did wilfully, unlawfully and feloniously make a false and fraudulent statement and representation in a matter within the jurisdiction of the Civil Service Commission, an agency of the United States, said matter being an investigation of the character and fitness of said CARL ALDO MARZANI for employment by the Office of the Coordinator of Information and the Office of Strategic Services, which said investigation was conducted by the said Civil Service Commission pursuant to a request by the said Office of the Coordinator of Information under the authority of statutes, rules and regulations of the United States, and executive orders of the President of the United States; that is to say;

That on or about November 23, 1942, in the city and district aforesaid, in response to a question propounded by a duly authorized agent of the said Civil Service Commission during the course of and pursuant to the aforesaid character and fitness investigation, the said CARL ALDO MARZANI falsely stated and represented that he had never been a member of the Communist Party, which statement and representation was false and fraudulent in this, to-wit; that the said CARL ALDO MARZANI was in fact a member of the said Communist Party (Sixth Assembly

1182 District, New York, New York,) during the years 1940 and 1941, all of which was well known to the said defendant at the time he made the aforesaid false and fraudulent statement and representation.

Contrary to the statute in such cases made and provided (Section 80, Title 18 U. S. C.) and against the peace and dignity of the United States of America.

COUNT VII.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present;

That on or about the twenty-third day of November in the year 1942 at Washington in the District of Columbia and within the jurisdiction of this Court;

CARL ALDO MARZANI,
alias TONY WHALES,

the defendant herein, whose more full, true and correct name is to the Grand Jurors unknown and who on and after March 7, 1942 was employed, on a temporary basis subject to a character and fitness investigation, by the Office of the Coordinator of Information and by its successor, the Office of Strategic Services, both of which offices were agencies of the United States having jurisdiction of matters concerning the security and welfare of the United during a period of war, and who, in a civilian capacity, was so employed (by the Office of Strategic Services) on or about November 23, 1942, did wilfully, unlawfully, and felouiously make a false and fraudulent statement and representation in a matter within the jurisdiction of the Civil Service Commission, an agency of the United States, said matter being an investigation of the character and fitness of said CARL ALDO MARZANI for employment by the Office of the Coordinator of Information and the Office of Strategic Services which said investigation was conducted by the said Civil Service Commission pursuant to
1183 a request by the said Office of the Coordinator of Information under the authority of statutes, rules and regulations of the United States, and executive orders of the President of the United States; that is to say;

That on or about November 23, 1942, in the city and district aforesaid, in response to a question propounded by a duly authorized agent of the said Civil Service Commis-

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sion during the course of and pursuant to the aforesaid character and fitness investigation, the said CARL ALDO MARZANI falsely stated and represented that he had never made any speeches against conscription, which said statement and representation was false and fraudulent in this, to-wit; that the said CARL ALDO MARZANI did in fact speak at various public gatherings advocating peace mobilization and urging his listeners to bring pressure upon their Congressmen and Senators for the purpose of defeating legislation for military conscription then pending before the Congress of the United States, and the said CARL ALDO MARZANI did in fact speak at various meetings of the Communist Party (Branch F. 2, Sixth Assembly District) urging said Party members to form delegations and visit their Congressmen for the purpose of protesting the enactment of the military conscription bill then pending before the said Congress, all of which was well known to the said defendant at the time he made the aforesaid false and fraudulent statement and representation.

Contrary to the statute in such cases made and provided (Section 80, Title 18 U. S. C.) and against the peace and dignity of the United States of America.

COUNT VIII.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present;

1184 That on or about the twentieth day of April in the year 1943, at Washington in the District of Columbia and within the jurisdiction of this Court;

CARL ALDO MARZANI,
alias TONY WHALES,

the defendant herein, whose more full, true and correct name is to the Grand Jurors unknown, and who on and after March 7, 1942 was employed, on a temporary basis subject to a character and fitness investigation, by the Of-

fice of the Coordinator of Information and by its successor, the Office of Strategic Services, both of which offices were agencies of the United States having jurisdiction of matters concerning the security and welfare of the United States during a period of war, and who, in a civilian capacity, was so employed (by the Office of Strategic Services) on or about April 20, 1943, did wilfully, unlawfully and feloniously make a false and fraudulent statement and representation in a matter within the jurisdiction of the Civil Service Commission, an agency of the United States, said matter being an investigation of the character and fitness of the said CARL ALDO MARZANI for employment by the Office of the Coordinator of Information and the Office of Strategic Services which said investigation was conducted by the said Civil Service Commission pursuant to a request by the said Office of the Coordinator of Information under the authority of statutes, rules and regulations of the United States, and executive orders of the President of the United States; that is to say;

That on or about April 20, 1943, in the city and district aforesaid, in response to a question propounded by a duly authorized representative of the said Civil Service Commission during the course of and pursuant to the aforesaid character and fitness investigation the said CARL ALDO MARZANI falsely stated and represented that he had never used the name or been known as TONY
1185 WHALES, which said statement and representation was false and fraudulent in this, to-wit; that the said CARL ALDO MARZANI had, in fact, adopted and used the name TONY WHALES, was known by said name in the Communist Party and under the said name was a member and worker in the said Party in New York City during the years 1940 and 1941, all of which was well known to the said defendant at the time he made the aforesaid false and fraudulent statement and representation.

Contrary to the statute in such cases made and provided

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(Section 80, Title 18 U. S. C.) and against the peace and dignity of the United States of America.

COUNT IX.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present;

That on or about the twentieth day of April in the year 1943 at Washington in the District of Columbia and within the jurisdiction of this Court;

CARL ALDO MARZANI,
alias TONY WHALES,

the defendant herein, whose more full, true and correct name is to the Grand Jurors unknown and who on and after March 7, 1942 was employed, on a temporary basis subject to a character and fitness investigation, by the Office of the Coordinator of Information and by its successor, the Office of Strategic Services, both of which offices were agencies of the United States having jurisdiction of matters concerning the security and welfare of the United States during a period of war, and who, in a civilian capacity, was so employed (by the Office of Strategic Services) on or about April 20, 1943, did wilfully, unlawfully, and feloniously make a false and fraudulent statement and representation in a matter within the jurisdiction of the
1186 Civil Service Commission, an agency of the United States, said matter being an investigation of the character and fitness of said CARL ALDO MARZANI for employment by the Office of the Coordinator of Information and the Office of Strategic Services, which said investigation was conducted by the said Civil Service Commission pursuant to a request by the said Office of the Coordinator of Information under the authority of statutes, rules and regulations of the United States, and executive orders of the President of the United States; that is to say;

That on or about April 20, 1943, in the city and district

aforesaid, in response to a question propounded by a duly authorized agent of the said Civil Service Commission during the course of and pursuant to the aforesaid character and fitness investigation, the said CARL ALDO MARZANI falsely stated and represented that he had never made any speeches against conscription, which said statement and representation was false and fraudulent in this, to-wit; that the said CARL ALDO MARZANI during the year 1940, did, in fact, in the City of New York, New York, speak at various public gatherings advocating peace mobilization and urging his listeners to bring pressure upon their Congressmen and Senators for the purpose of defeating legislation for military conscription then pending before Congress of the United States, and the said CARL ALDO MARZANI during the year 1940, did, in fact, in the City of New York, speak at various meetings of the Communist Party (Branch F. 2, Sixth Assembly District) urging said Party members to form delegations and visit their Congressmen for the purpose of protesting the enactment of the military conscription bill then pending before the said Congress, all of which was well known to the said defendant at the time he made the aforesaid false and fraudulent statement and representation.

Contrary to the statute in such cases made and provided (Section 80, Title 18 U. S. C.) and against the peace and dignity of the United States of America.

1187 COUNT X.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present;

That on or about the first day of June in the year 1946, at Washington in the District of Columbia and within the jurisdiction of this Court:

CARL ALDO MARZANI,
alias TONY WHALES,

the defendant herein, whose more full, true and correct

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name is to the Grand Jurors unknown, and who was transferred to the State Department of the United States from the Office of Strategic Services on or about September 20, 1945, on which date certain of the functions and personnel of the said Office of Strategic Services were, by Executive Order No. 9621, transferred to and consolidated within the said State Department and who on and after September 20, 1945, was employed in a civilian capacity by the said State Department in the Interim Research and Intelligence Service, and in the Presentation Division of the Office of Departmental Administration, did willfully, unlawfully and feloniously make a false and fraudulent statement and representation in a matter within the jurisdiction of the said State Department of the United States, said matter being an inquiry into the character and fitness of the said CARL ALDO MARZANI (and other personnel transferred to the State Department by Executive Order No. 9621) for continued employment by the said State Department; that is to say;

That on or about June 1, 1946, in the city and district aforesaid, during a conference with a duly authorized officer of the said State Department, who was then and there inquiring into the character and fitness of the said defendant for continued employment by the said Department for the purpose of making recommendations to the said Department concerning the matter of continuing or terminating the aforesaid employment, the said CARL ALDO MARZANI falsely stated and represented that he had never been a member of the Communist Party, which said state-
1188 ment and representation was false and fraudulent in this, to-wit; that the said CARL ALDO MARZANI was in fact a member of the said Communist Party (Sixth Assembly District, New York, New York) during the years 1940 and 1941, all of which was well known to the said defendant at the time he made the aforesaid false and fraudulent statement and representation.

Contrary to the statute in such cases made and provided (Section 80, Title 18 U. S. C.) and against the peace and dignity of the United States of America.

COUNT XI.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present;

That on or about the first day of June in the year 1946, at Washington in the District of Columbia and within the jurisdiction of this Court;

CARL ALDO MARZANI,
alias TONY WHALES,

the defendant herein, whose more full, true and correct name is to the Grand Jurors unknown, and who was transferred to the State Department of the United States from the Office of Strategic Services on or about September 20, 1945, on which date certain of the functions and personnel of the said Office of Strategic Services were, by Executive Order No. 9621, transferred to and consolidated within the said State Department, and who on and after September 20, 1945, was employed in a civilian capacity by the said State Department in the Interim Research and Intelligence Service, and in the Presentation Division of the Office of Departmental Administration, did wilfully, unlawfully, and feloniously make a false and fraudulent statement and representation in a matter within the jurisdiction of the said State Department of the United States, said matter being an inquiry into the character and fitness of the said
1189 CARL ALDO MARZANI (and other personnel transferred to the State Department by Executive Order No. 9621) for continued employment by the said State Department; that is to say;

That on or about June 1, 1946, in the city and district aforesaid, during a conference with a duly authorized officer of the said State Department, who was then and there

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inquiring into the character and fitness of the said defendant for continued employment by the said Department for the purpose of making recommendations to the said Department concerning the matter of continuing or terminating the aforesaid employment, the said CARL ALDO MARZANI falsely stated and represented that he had never used the name or been known as TONY WHALES, which said statement and representation was false and fraudulent in this, to-wit; that the said CARL ALDO MARZANI had, in fact, adopted and used the name TONY WHALES, was known by said name in the Communist Party and under the same name was a member and worker in the said Party in New York City during the years 1940 and 1941, all of which was well known to the said defendant at the time he made the aforesaid false and fraudulent statement and representation.

Contrary to the statute in such cases made and provided (Section 80, Title 18, U. S. C.) and against the peace and dignity of the United States of America.

TRUE BILL:

HELEN M. HOFFMAN
Foreman.

GEORGE MORRIS FAY
United States Attorney.

THERON LAMAR CAUDLE
Assistant Attorney General of the Criminal Division.

JOHN M. KELLEY, JR.
Special Assistant to the Attorney General.

• • • •

1190 Come as well the Attorney of the United States, as the defendant in proper person, and by his attorney, Charles E. Ford, Esquire; whereupon the defendant being arraigned upon the indictment, the reading whereof he specifically waives, pleads not guilty thereto, and for trial puts himself upon the country and the Attorney of the United States doth the like; and thereupon by consent of the United States Attorney the defendant is granted

leave within Fifteen (15) days to withdraw said plea and demur to, or move to quash the said indictment, or otherwise plead as he may be advised; and thereupon bond is fixed by the Court in this case at Two Thousand, Five Hundred ($2,500.00) Dollars.

• • • •

1191 The defendant moves that the indictment be dismissed on the following grounds:

(1) The indictment does not state facts sufficient to constitute an offense against the United States.

(2) The indictment was not found within three years next after the alleged offense was committed.

Dated, February 18th, 1947.

CHARLES E. FORD,
Attorney for Defendant.

• • • •

1192 MEMORANDUM OPINION

Motion to Dismiss.

Theron L. Caudle, Assistant Attorney General,
George M. Fay, United States Attorney,
John M. Kelley, Jr., Special Assistant to
the Attorney General, Washington, D. C.,
Attorneys for plaintiff,

Charles E. Ford, Washington, D. C.,
Attorney for defendant.

Under an indictment returned in this jurisdiction on January 17, 1947, the defendant is charged in eleven counts with violation of Section 80, Title 18, United States Code.

It appears from the record now before the Court that defendant was employed on and after March 7, 1942, on a temporary and conditional basis, subject to character and

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fitness investigation, by the Office of Coordinator of Information and its successor, Office of Strategic Services, and on September 20, 1945, was transferred to the Department of State.

In the first nine counts of the indictment it is charged that on separate occasions, to two different investigative authorities, defendant "did wilfully, unlawfully and feloniously make a false and fraudulent statement and representation" to the effect that he was not a member of the Communist Party; that he had never attended any of its meetings, never contributed any services to the Communist Party, never participated in any of its activities, never made any speeches against conscription; and that he had never used or been known by the name of Tony Whales or any similar name.

1193 The last two counts of the indictment cover similar offenses except that the false and fraudulent statements are alleged to have been made on June 1, 1946, when defendant was being interrogated by a State Department officer.

Defendant has moved to dismiss the indictment on the grounds: (1) that it does not state facts sufficient to constitute an offense against the United States, and (2) that it was not found within three years next after the alleged commission of the offense. Concededly this latter applies only to counts one to nine, inclusive, since the other two counts are well within the three-year statutory period prescribed by Section 582 of Title 18, United States Code.

Briefly summarized, the points advanced in support of the motion are as follows:

(1) The agencies referred to in the several counts of the indictment (Federal Bureau of Investigation as to Counts I to IV, inclusive; Civil Service Commission as to Counts V to IX, inclusive; and the Department of State as to Counts X and XI) were without power or authority

to make the inquiries as to which defendant is alleged to have made false statements.

(2) The questions propounded to the defendant were unauthorized, illegal, concerned his private, personal, political activities, and were without the jurisdiction of the agencies involved.

(3) The questions propounded to the defendant were not pertinent to the character and fitness investigation of the defendant as an employee of the United States Government.

(4) The quetions asked of the defendant were not material or relevant to the character and fitness investigation.

(5) The alleged false statements did not serve to conceal any illegal or prohibited acts.

(6) The indictment fails to allege any specific intent on the part of defendant to defraud the government.

1194 (7) The language of the statute (18 U. S. C. 80), insofar as applicable to defendant under the circumstances, is so vague and indefinite as to be repugnant to the Fifth Amendment to the Constitution.

(8) The indictment violates the Fifth and Sixth Amendments to the Constitution as it fails to inform defendant of the nature and cause of the accusation.

(9) The indictment fails to state facts sufficient to constitute a crime.

(10) to (16), inclusive: The indictment violates the Fifth Amendment to the Constitution since it charges the same offense in a multiplicity of counts.

(17) Counts one to nine of the indictment are barred by the statute of limitations (18 U. S. C. 582).

(18) Conviction hereunder would pervert the legislative intent in enactment of the statute (18 U. S. C. 80) and deprive defendant of his constitutional rights.

These points will be dealt with in the order listed:

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(1) Authority of Federal Bureau of Investigation to investigate defendant:

In addition to its broad general investigative powers (5 U. S. C. 300) the Congress of the United States specifically vested this agency of the government with authority to investigate employees of the Federal Government "who are members of subversive organizations or advocate the overthrow of the Federal Government by force." (Appropriation Acts of June 28, 1941, Public Law 135, 77th Congress, and July 2, 1942, Public Law 644, 77th Congress.)

Furthermore, the Congress specifically provided in the so-called Hatch Act (53 Stat. 1148, 18 U. S. C. 61i) that:

"It shall be unlawful for any person employed in
1195 in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States."

(b) Authority of Civil Service Commission to investigate defendant:

In view of the recent holding in this Court in the case of *Friedman v. Schwellenbach,* 65 Fed. Supp. 254, affirmance of which by our Court of Appeals (Case No. 9305) on December 16, 1946, was approved by the Supreme Court in denying certiorari on March 17, 1947, it would appear that no further discussion on this point is necessary.

(c) Authority of State Department officer to interrogate defendant:

Without further elaboration, it is sufficient to point out that the Appropriation Act for the State Department for the fiscal year ending June 30, 1946,* provides:

"No part of any appropriation contained in this Act shall be used to pay the salary or wages of any person who advocates, or who is a member of an organization that advo-

cates, the overthrow of the Government of the United States by force or violence."

And, in further answer to this objection on the part of defendant, what better source of information would be available to an officer of the executive department than the individual himself?

(2), (3), (4). In view of the authority of the agencies involved, the Court holds as a matter of law that the questions propounded of defendant were pertinent, relevant, material, and well within the scope of the investigation as to the defendant's character and fitness, for they had a direct bearing thereon. This is doubly true in time of war, and particularly in view of the character of the agencies involved and the nature of the work with which they were charged.

(5) We are not concerned here with whether or not the defendant was a member of the Communist Party, parti-

*Public Law 61, 79th Congress.

cipated in its activities, or used an alias. That is a
1196 matter of proof for the trial. It is true that membership in the Communist Party is not in and of itself unlawful. A comparable contention was advanced in *United States* v. *Barra,* (C. C. A. 2, 1945) 149 Fed. (2d) 489, and decided adversely to defendant. In that case the Court stated that once it appears that the department "has colorable authority to do what it is doing" an accused under the statute (18 U. S. C. 80) cannot justify his falsehood by a collateral attack upon the authority. The authorities in support of this ruling are too numerous to enumerate.

(6) While the question of intent is a matter for the trial court (*United States* v. *DeLorenzo,* 151 Fed. (2d) 122, C. C. A. 2, 1945), it should be borne in mind that the indictment charges the defendant with "wilfully, unlawfully and feloniously" making "false and fraudulent" statements. The word "feloniously" itself, in an indictment, means "with criminal intent". *Stephens* v. *United*

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States, 262 Fed. 957; Milller on Criminal Law, Ch. 5, Sec. 20(f). This very point was before the court in the case of *Bank of Montreal* v. *Thayer,* 7 Fed. 622, in which the complaint alleged certain representations were made "wrongfully, fraudulently, and falsely." The court there said:

"It is said that a fraudulent intent is not alleged; but it is difficult to see how representations as to a matter of fact can be wrongful, fraudulent, and false, without they are made with a fraudulent intent. It is certainly necessary to prove the intent, and of course it must be alleged, but no form of words is necessary. If the terms employed by the pleader, taken in their ordinary signification, necessarily include the idea of a fraudulent intent, that is enough. We must give to the term 'fraudulently,' as found in the petition, the meaning which the law gives it, and which attaches to it in common usage, to-wit, a deliberately-planned purpose and intent to deceive and thereby to gain an unlawful advantage. After stating what representations were made with sufficient particularity, it is enough to aver that they were wrongful, false, and fraudulent. It is not necessary in such a pleading to define the meaning of these terms; and to say that the representations were made with intent to deceive, would add nothing to the allegation that they were falsely and fraudulently made."

1197 (7), (8), (9). This indictment more than adequately charges the crime, states facts sufficient to constitute a crime, and apprises defendant of the charges against him, thereby preserving his constitutional guarantees. *United States* v. *Meyer,* 140 Fed. (2d) 652 (C. C. A. 2, 1944).

(10) to (16), inclusive: Each count of the indictment charges an offense different from the others either from a standpoint of time when the alleged false and fraudulent statements were made or with respect to different governmental agencies. The test of double jeopardy through a

multiplicity of counts is whether a conviction on one count and an acquittal on another would bring about a contradiction on the face of the verdict.

(17) The first nine counts of this indictment, which was returned January 17, 1947, charge the making of false and fraudulent statements by defendant between July 29, 1942, and April 20, 1943. If the general statute of limitations (18 U. S. C. 582) applies, concededly the prosecution as to these counts is barred.

It is the government's claim that the running of the statute was, on August 24, 1942, tolled by the enactment on that date of Section 590a of Title 18, United States Code, which covered, inter alia, offenses involving "defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner."

The defendant's argument, in brief, is that the suspension statute (18 U. S. C. 590a) cannot be distorted so as to make it applicable to any crime of which fraud in the ordinary sense is not an integral part (*United States* v. *Noveck*, (1926) 271 U. S. 201; *United States* v. *McElwain*, (1926) 272 U. S. 633; *United States* v. *Scharton*, (1932) 285 U. S. 518), and, since the suspension statute was enacted as a part of the Contract Settlement Act of 1944 (58 Stat. 667), it necessarily relates to frauds involv-
1198 ing pecuniary or property loss to the United States.

This indictment is based solely on 18 U. S. C. 80, which is a fraud statute, and the case is distinguishable from those heretofore passed upon wherein an attempt was made to apply an earlier suspension statute to prevent the tolling of the statute of limitations to separate and distinct crimes where fraud was not an element of the offense as defined by the penal statute on which the indictment was based.

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The pertinent portions of the applicable statutes read as follows:

18 *U. S. C.* 80: "***whoever shall***make or cause to be made any false or fraudulent statements or representations *** in any matter within the jurisdiction of any department or agency of the United States *** shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

18 *U. S. C.* 582: "No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 584, of this title (referring to crimes under revenue or slave trade laws) unless the indictment is found, or the information is instituted within three years next after such offense shall have been committed."

18 *U. S. C.* 590a: "The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner *** shall be suspended until three years after the termination of hostilities in the present war ***."

Following the decision of the Supreme Court in *United States* v. *Gilliland,* (1941) 312 U. S. 86, 93, it cannot be successfully contended that 18 U. S. C. 80 relates only to fraudulent causing of pecuniary or property loss to the government. Therein, Chief Justice Hughes declared:

"The amendment (Act of June 18, 1934, 48 Stat. 996) eliminated the words 'cheating and swindling' and broadened the provision so as to leave no adequate basis for the limited construction which had previously obtained. The statute was made to embrace false and fraudulent
1199 statements or representations where these were knowingly and wilfully used in documents or affidavits 'in any matter within the jurisdiction of any department or agency of the United States.' In this there was no restriction to cases involving pecuniary or property loss

to the government. The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described. We see no reason why this apparent intention should be frustrated by construction." 1/2/

Section 590a of Title 18 of the United States Code was enacted August 24, 1942, as a separate and distinct Act of Congress (Public Law 706, 77th Congress, 56 Stat. 747), to suspend temporarily the running of statutes of limitations applicable to offenses involving defrauding or attempts to defraud the United States or any agency thereof. Section 19(b) of the Contract Settlement Act, enacted July 1, 1944 (Public Law 395, 78th Congress, 58 Stat. 649, 667), merely amended the 1942 act by enlarging it specifically to include any offense under the Contract Settlement Act and by extending the time for suspension of the statutes of limitations. Section 28 of the Surplus Property Act of 1944, enacted October 3, 1944 (Public Law 457, 78th Congress, 58 Stat. 765, 781), again amended the 1942 act by making it applicable to a further class of offenses, those under the Surplus Property Act. It is significant to point out that neither of these amendments changed the wording of the statute here involved, namely:

"**** defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner ***."

1/ See also *U. S.* v. *Mellon*, 96 Fed. (2d) 462 (C. C. A. 2, 1938), certiorari denied 304 U. S. 586: *U. S.* v. *Presser*, 99 Fed. (2d) 819 (C. C. A. 2, 1938); *U. S.* v. *Swisher*, 109 Fed. (2d) 1000 (C. C. A. 10, 1940); *U. S.* v. *Agnew*, E. D. Pa., 1947, Cr. No. 13975.

2/ See also *U. S. v. Zavala*, 139 Fed. (2d) 830, 831 (C. C. A. 2, 1944), which holds that 18 U. S. C. 80 covers the use of a document to defraud and the use of any false statement, oral or written, as to any matter within the jurisdiction of any department or agency of the United States.

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Its application, therefore, to the false statements embraced in this indictment can hardly be questioned.

1200 It cannot, therefore, be successfully argued that these amendments limited the scope of the suspension statute to frauds involving pecuniary or property loss to the government.

While it is true that the amendments to the original act are to be found in the Contract Settlement Act and the Surplus Property Act, this fact is neither significant nor controlling, for both of the latter acts contain other provisions that are not germane to the subject matter of either contract settlements or surplus property.

In contrast with the 1942 act, the suspension of the running of the statutes of limitations for similar offenses enacted after World War I, discussed at length by counsel for defendant, was enacted as a proviso appended to R. S. §1044 (18 U. S. C. 582, 42 Stat. 220), the section dealing with general limitations on offenses not capital. According to rules of construction, a proviso containing exceptions to a general policy is to be strictly construed; but it is important to note that here we are not dealing with a proviso clause—on the contrary, we are concerned with the main body of the act itself.

One of the authorized functions of governmental departments and agencies, particularly in time of war, is to see that their employees are loyal to our democratic form of government and to no other. For an employee to falsely state that he was not a member of the Communist Party amounts to a deceptive practice which, as Justice Hughes stated in *United States* v. *Gilliland,* supra, was exactly what was encompassed within the amendment of June 18, 1934.

As to whether or not fraud is inherent in false answers given by a government employee in connection with his employment, see *Palmer* v. *Colladay,* 18 App. D. C. 426, wherein it is stated:

"The Civil Service Commission is a legal agency of the

United States, created by Act of Congress; and through it the President undertakes to find and appoint such persons as may best promote the efficiency of the civil service; and to that end regulations are prescribed by means of which the age, health, *character*, knowledge, and ability for the branch of service into which he seeks to enter, of each candidate, may be fully ascertained.

"If falsehoods are imposed upon the persons charged with the duty of ascertaining these qualifications, and made to take the place of facts, then the United States is defrauded, is deprived by deceit of the knowledge justly due to its officers in the proper discharge of its business, and it is thereby liable to obtain a less efficient employee." (Emphasis supplied.)

See also *United States* v. *Curley*, 122 Fed. 738, certiorari denied 195 U. S. 628.

In *Burdick* v. *Post*, 12 Barb. 168, 186, it is said that "to defraud" is to withhold from another that which is justly due him or to deprive him of a right by deception or artifice, and Bouvier adopts this definition. Thus it will be seen that the word "defraud" in legal acceptation refers to rights, as well as property and money.

"Moreover, when the word 'defraud' is used in connection with the government and the law itself, it naturally and necesarily has a broader and a different meaning than when used in connection with personal rights or in connection with individual rights of property." *Curley* v. *United States*, 130 Fed. 1, 11.

(18) Where there is no ambiguity in the statute, it is unnecessary to consider legislative intent.

In the light of the foregoing, defendant's Motion to Dismiss is denied.

R. B. KEECH
Associate Justice.

April 25, 1947.

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673 Mr. Kelley. May it please the Court, the Government rests.

Mr. Ford. May we approach the bench?

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675 Now, at this time I want to renew all the motions and all the objections that I heretofore made in the case.

The Court. Very well, sir.

Mr. Ford. And at this time I move, your Honor, to instruct the jury to bring in a judgment of not guilty.

The Court. I will deny it at this time, sir.

• • • •

1120 Mr. Ford. At this time, may it please your Honor, I move for a judgment of acquittal on the entire indictment and each separate count thereof, on the ground that the charges in the indictment have not been proven, and on the ground that no intent has been shown as required by the offenses charged in each count of the indictment.

Secondly, I move for judgment of acquittal on counts 1 to 9 because they are barred by the statute of limitations.

Third, I move for judgment of acquittal and the dismissal of the indictment on all the grounds set forth in the motion heretofore filed for the dismissal of the indictment prior to the trial.

Fourth, I move that the Government now be required to elect between counts 5, 8, and 11, counts 1 and 6 and 10, counts 7 and 9, and counts 3 and 4, because they charge the same offense as against each other.

Fifth, I make a motion for the withdrawal of a
1121 juror and for your Honor to declare a mistrial because of all of the evidence, and each of it, introduced by the Government concerning the defendant's wife.

Sixth, I move for the withdrawal of a juror and a mistrial because of the evidence introduced by the Government regarding the defendant Marzani and the Board of Public Welfare, and because of the testimony offered by

the Government by the witness Panuch, who was permitted to state that he told Marzani that he made a false statement under oath to the W. P. A.

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1122 I move for a mistrial and withdrawal of a juror, because the Government was permitted to cross-examine a character witness, to wit, General Greenbaum, before the defendant's counsel completed his direct examination; coupled up with the fact that I was not permitted to preliminarily examine the witness Drew about the integrity of all of his records before he was permitted to use and refresh his recollection from the same; on the theory that after he had testified and said he refreshed his recollection, it was too late, because the matter of his reports, which he recited, was then in evidence and heard by the jury.

Eighth, I move for a mistrial because of the use and the evidence adduced by the Government relative to the nominating petitions as they are not the basis of any charge contained in the indictment against the defendant.

Then I repeat all motions previously made, in-
1123 cluding those where evidence attempted to be offered by the defendant was excluded by the Court, and all motions where evidence was offered by the Government and objections were overruled, and all motions that may appear in the record regarding mistrials, including the objections made to testimony which was testimony offered by the Government on the basis that the Government assured the Court that they would connect up that evidence; that in those places where that promise was made, it was not kept, and they were not connected up.

• • • •

1148 *Proceedings*

The Court. Suppose you gentlemen approach the bench a minute.

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(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

The Court. I think it would be well for me to state at this time that I considered the motions made yesterday by defense counsel, and I am now denying them.

Mr. Ford. May the record show I take an exception?

• • • •

1150 *Charge to the Jury*

The Court (Keech, J.). Ladies and gentlemen of the jury, the defendant, Carl Aldo Marzani, is before the Court on an indictment charging violation of certain provisions of Title 18, Section 80, of the United States Code. The indictment is in eleven counts. The substance thereof is that the defendant did make certain false and fraudulent statements, on the dates shown, and in the District of Columbia, to duly constituted government authorities, namely, the Federal Bureau of Investigation, the Civil Service Commission, and the Department of State, in connection with character and fitness examination of the defendant, all of which was well known to the defendant, and that the said false and fraudulent statements were wilfully made.

It is now your duty to determine whether the defendant is guilty or not guilty of the charges on which he is being tried. It is my duty to instruct you as to the law applicable to this case and that must govern you in your deliberations and in arriving at your conclusion. You
1151 are bound and obligated to follow the Court's instructions as to the law, but you, ladies and gentlemen of the jury, are the sole judges of the facts, and you must determine the facts for yourselves, solely on the basis of the relevant evidence adduced before you.

The Court is permitted to summarize and discuss the evidence in order to assist the jury in arriving at its conclusion; but, if your recollection of the evidence differs in

any respect from the Court's recollection, then your recollection must prevail, because the final decision on the facts is entirely within your province, while my instructions are binding on you only as to the law.

The fact that a defendant has been indicted and is charged with a crime is not in itself to be taken as an indication of guilt, and no inference is to be drawn against him from that fact, because an indictment is merely the machinery and the procedure that the law provides for bringing a defendant before the Court and placing him on trial. That is the only function of an indictment.

Every defendant in a criminal case is presumed to be innocent, and this presumption of innocence attaches to the defendant throughout the trial. The burden of proof is on the Government to prove the defendant guilty beyond a reasonable doubt, and unless the Government sustains this burden and proves each essential element beyond a reasonable doubt that he committed the crime with
1152 which he is charged you must find him not guilty.

But, you might ask, what is meant by "a reasonable doubt". It does not mean any doubt whatsoever. Proof beyond a reasonable doubt is proof to a moral certainty and not necessarily proof to an absolute or a mathematical certainty. By a reasonable doubt, as its name implies, is meant a doubt based on reason, not any whimsical or capricious conjecture. It is a doubt which is reasonable in view of all the evidence. If, after impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied with the guilt of the defendant, you have a reasonable doubt. But, if after such impartial comparison and consideration of all the evidence you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your personal affairs, then you have no reasonable doubt.

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If you can reconcile the evidence in this case with any reasonable hypothesis consistent with the innocence of the defendant, you should do so; and, in that case your verdict would be "not guilty".

And, I might add at this point, that evidence of good character, taken in conjunction with all the other evidence before you, might be sufficient to create in your minds a reasonable doubt.

1153 In determining whether the Government has established the charge against the defendant beyond a reasonable doubt, you will consider and weigh all the testimony of all the witnesses who have testified before you, including the defendant. You are the sole judges of the credibility of witnesses. In determining whether to believe the testimony of any witness, and in weighing the testimony of any witness, you may consider his demeanor on the stand, his manner of testifying, whether he impresses you as having an accurate memory and recollection, and whether he impresses you as a truth-telling individual.

You are further instructed that while the law makes the defendant a competent witness in this case, yet you have the right to take into consideration his situation and interest in the result of your verdict, and all the circumstances which surround him, and give to his testimony only such weight as in your judgment it is fairly entitled to.

If you should find that any witness wilfully testified falsely as to any material fact, you are at liberty, if you deem it wise to do so, to disregard the entire testimony, or any part thereof, of such witness, except where corroborated by other credible testimony.

The defendant in this case is charged with having made false and fraudulent statements to a government agency and the applicable portion of the statute covering this

1154 offense provides that (and I quote):

"... whoever shall ... make or cause to be made any false or fraudulent statements or representations ...

in any matter within the jurisdiction of any department or agency of the United States . . ."
shall be subjected to certain penalties.

You will note from some of the testimony and the indictment itself that certain of these statements were alleged to have been made four or five years ago. The Court says to you that that is a matter of law which has been resolved by the Court and is, therefore, not for your consideration.

This indictment is in eleven counts and you are required to return a verdict of guilty or not guilty as to each and every count.

COUNT 1 charges the defendant with wilfully, unlawfully, and feloniously making a false and fraudulent statement to an agent of the FBI on July 29, 1942, that he had never been a member of the Communist Party; whereas in fact during the years 1940 and 1941 he was a member of said Communist Party (Sixth Assembly District, New York, New York).

COUNT 2 charges the defendant with wilfully, unlawfully, and feloniously making a false and fraudulent statement to an agent of the FBI on July 29, 1942, that he had never attended any meetings of the Communist Party; whereas in fact he did attend meetings of
1155 the Communist Party in New York City on or about July 22, 1940, July 23, 1940, August 12, 1940, September 3, 1940, October 14, 1940, October 17, 1940, November 25, 1940, December 2, 1940, December 9, 1940, February 11, 1941, February 22, 1941, May 28, 1941, September 22, 1941, and at various other times.

COUNT 3 charges the defendant with wilfully, unlawfully, and feloniously making a false and fraudulent statement to an agent of the FBI on July 29, 1942, that he had never contributed any services to the Communist Party; whereas during the years 1940 and 1941, at divers times and places in the City of New York, New York, he had contributed various services to said Communist Party, such as serving as Branch Organizer and Section Educational

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Director in the Sixth Assembly District, delivering lectures to Communist Party recruit classes on the principles of communism, issuing and collecting Communist Party membership books, composing, editing, publishing and distributing pamphlets in the interest and on behalf of the Communist Party, counseling and advising Communist Party members and recruits with respect to methods and means to be employed in infiltrating divers groups and societies for the purpose of creating Communist Front organizations, urging Communist Party members to protest to their Congressmen against passage of an anti-strike bill, instructing Communist Party members to obtain re-
1156 cruits for said Party, counseling and instructing Communist Party members to sow resentment and discontent among Negroes by agitating the question of racial discrimination, to the end that members for said Party might thus be recruited, urging Communist Party members to attend study classes to the end that they might improve their knowledge of the doctrines and methods of said Party, distributing among Communist Party members tickets to a showing of the Soviet film, "Great Beginning", and in the capacity of Branch Organizer of said Communist Party, counseling and instructing divers Party members concerning a plan, policy, and program of the said Party having for its purpose disintegration of the morale of Military Forces of the United States, teaching the principles of communism to men in said Military Forces, and recruiting members for the Communist Party from the ranks of said Military Forces to the end that the Communist Party might gain control thereof and thus bring about a revolt against the Capitalist System.

COUNT 4 charges the defendant with wilfully, unlawfully, and feloniously making a false and fraudulent statement to an agent of the FBI on July 29, 1942, that he had never participated in any of the activities of the Communist Party; whereas, in fact, during the years 1940 and 1941, at divers times and places in New York City he had

participated in the activities of the Communist Party as described in the previous count.

1157 *COUNT 5* charges the defendant with wilfully, unlawfully, and feloniously making a false and fraudulent statement to an official of the Civil Service Commission on November 23, 1942, that he had never used the name or been known as Tony Whales; whereas in fact he had adopted and used the name Tony Whales, was known by that name in the Communist Party, and under the same name was a member and worker in the said Party in New York City during the years 1940 and 1941.

COUNT 6 charges the defendant with wilfully, unlawfully, and feloniously making a false and fraudulent statement to an official of the Civil Service Commission on November 23, 1942, that he had never been a member of the Communist Party; whereas he was a member of said Communist Party (Sixth Assembly District, New York, New York) during the years 1940 and 1941.

COUNT 7 charges the defendant with wilfully, unlawfully, and feloniously making a false and fraudulent statement to an official of the Civil Service Commission on November 23, 1942, that he had never made any speeches against conscription; whereas he did in fact speak at various public gatherings advocating peace mobilization and urging his listeners to bring pressure upon their Congressmen and Senators for the purpose of defeating legislation for military conscription then pending before the Congress of the United States, and he did in fact speak at

1158 various meetings of the Communist Party (Branch F-2, Sixth Assembly District) urging said Party members to form delegations and visit their Congressmen for the purposeof protesting the enactment of the military conscription bill then pending before the Congress.

COUNT 8 charges the defendant with wilfully, unlawfully, and feloniously making a false and fraudulent statement to an official of the Civil Service Commission on April 20, 1943, that he had never used the name or been

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known as Tony Whales; whereas he had, in fact, adopted and used the name Tony Whales, was known by that name in the Communist Party, and under that name was a member and worker in the Communist Party in New York City during the years 1940 and 1941.

COUNT 9 charges the defendant with wilfully, unlawfully, and feloniously making a false and fraudulent statement to an official of the Civil Service Commission on April 20, 1943, that he had never made any speeches against conscription; whereas during the year 1940 the defendant did, in fact, in the City of New York speak at various public gatherings advocating peace mobilization and urging his listeners to bring pressure upon their Congressmen and Senators for the purpose of defeating legislation for military conscription then pending before the Congress of the United States, and during the year 1940 he did, in fact, in New York City, speak at various meetings of the Communist Party (Branch F-2, Sixth Assembly District) urging said Party members to form
1159 delegations and visit their Congressmen for the purpose of protesting the enactment of the military conscription bill then pending before the Congress.

COUNT 10 charges the defendant with wilfully, unlawfully, and feloniously making a false and fraudulent statement to a duly authorized officer of the State Department on June 1, 1946, that he had never been a member of the Communist Party; whereas defendant was, in fact, a member of the Communist Party (Sixth Assembly District, New York, New York) during the years 1940 and 1941.

COUNT 11 charges the defendant with wilfully, unlawfully, and feloniously making a false and fraudulent statement to a duly authorized officer of the State Department on June 1, 1946, that he had never used the name or been known as Tony Whales; whereas defendant was known by the name Tony Whales in the Communist Party, and under that name was a member and worker in said Party in New York City during the years 1940 and 1941.

In addition, each count alleges that the true facts were then and there well known to the defendant. Each count alleges that the false and fraudulent statement was made at a time when the defendant either was in the employ, or was being transferred, or had been transferred from one agency of the Government to another, when the character and fitness of the defendant were being investigated
1160 in connection with his employment, its termination or continuation of his temporary employment with such agencies.

The indictment further alleges that the matters which weer the subject of the investigations referred to in the 11 counts were within the jurisdiction of a department or agency of the United States, to wit, the Federal Bureau of Investigation, the Civil Service Comission, and the State Department.

I have ruled as a matter of law that it was within the authority of the Office of the Coordinator of Information, Office of Strategic Services, and the State Department to request an investigation of the defendant regarding his character and fitness; and that the Federal Bureau of Investigation, the Civil Service Commission, and the State Department, as a matter of law, had the right to make the investigations in question.

I have also ruled, as a matter of law, that the questions propounded of the defendant by the several agencies of the Government were material to the investigation being conducted.

The Court further finds and instructs you, as a matter of law, that the agencies involved, namely, the Office of Coordinator of Information, and the Office of Strategic Services and the State Department, as its successors, were agencies of the United States having jurisdiction of matters concerning the security and welfare of the United States during a period of war.

1161 Throughout these instructions I have used the terms "fraudulent" and "feloniously". I shall en-

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deavor to explain to you the legal meaning of these terms, as well as the term "fraud", particularly as they are applicable to the statute here involved.

The term "fraud" as applied to this offense is defined in law to be a deception practiced by an individual in connection with any matter within the jurisdiction of any agency or department of the Government. It has a broader meaning where the Government is involved than it does when used in connection with individual rights of property. It is sufficient here to add that if falsehoods are imposed upon persons charged with the duty of ascertaining the qualifications of government employees, then the United States has been subjected to a fraud; that is, it has been deprived by deceit of the knowledge justly due in the proper discharge of its business. I further say to you that pecuniary or monetary loss to the Government is not an element of the offense, so that the Government is not required to prove that the Government has suffered a pecuniary loss in connection with the crime here charged.

So then we come to the meaning of the word "fraudulent". We must give to the term "fraudulent" the meaning the law gives to it, to wit, a deliberately-planned purpose and intent to deceive and thereby gain an unlawful advantage. As you know, one cannot see into the mind of another human being to ascertain his intentions—they can only be gathered from his words and deeds. Intent is an illusive or abstract thing capable of being understood, as I have said, only as a result of observing one's actions or hearing one's utterances. "Intent" as applicable to this case must be found from the evidence here presented, in the light of all of the circumstances under which the act or acts occurred or statements were made.

1162

Likewise, the word "feloniously" means "with criminal intent", or with intent to commit the crime charged in the statute to which I have previously called your attention.

I instruct you that you are not to concern yourselves with evidence ruled out by the Court, nor are you to consider colloquies between opposing counsel or between Court and counsel, as they are not evidence.

There has been considerable evidence introduced in this case, both by the Government and by the defense, which was not material to the issues involved, so I want to stress two points to you at this time:

First, your determination of the guilt or innocence of the defendant must be reached solely on the basis of the relevant evidence adduced at this trial, without any feeling or emotion, bias or prejudice, without any anger on the one hand, and without any sympathy on the other.

1163 Second, it should be clearly understood by each and every juror that the defendant is not being tried to having been a member of the Communist Party; for having participated in the activities of that organization; or for having used the name Tony Whales. Nor, might I add, is the Communist Party on trial here. We are not concerned with the virtues or the vices of the Communist Party. Neither are the loyalty or disloyalty of the defendant, or whether he resigned or was dismissed from government service, material to the issue in this case.

Witnesses for the Government have identified the defendant as having been a member of the Communist Party, as having contributed services to and participated in its activities—and as to this you will recall that certain dates and places were mentioned—and also as having been known within the Communist Party as Tony Whales. Witnesses have also testified that the defendant made speeches against legislation for military conscription. Against this you have the statements of the defendant that he was not a member of the Communist Party, that he did not contribute any services or participate in its activities, and that he was never known by any name other than Carl Aldo Marzani, and that he never made any speeches against conscription.

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Those, ladies and gentlemen, briefly, are the facts before you.

1164 It is incumbent upon the Government, as I have heretofore said to you, to prove all the esesntial elements of the crime charged. Briefly, these elements are:

1. That the defendant made the statements charged.
2. That the statements were false.
3. That the false statements were made wilfully, knowingly, and fraudulently.

If you believe that the prosecution has proved all of these elements, beyond a reasonable doubt, then you must find the defendant "Guilty".

If, on the other hand, you believe the Government has not proved any one or more of these elements, beyond a reasonable doubt, you must find the defendant "Not Guilty".

This is true as to each and every count of the indictment.

The simple issue here involved is whether or not the defendant knowingly, wilfully, and feloniously made false and fraudulent answers to the questions asked of him.

You, of course, know that your verdict must be unanimous, and, as I have instructed you, you will render a separate verdict on each of the counts in the indictment, and in each instance your verdict may be either guilty or not guilty.

Do counsel have any suggestions?

1165 (Counsel for both side approached the bench and conferred with the Court, in a low tone of voice, as follows:)

Mr. Ford. There is one fact that I think, if my hearing is correct, you omitted.

In giving the charge on character testimony, I think there was left out of it the following element: "where, without it, the other evidence may convince you of his guilt."

If you have covered it, that is all right. I just do not remember your covering it.

The Court. Mr. Ford, at this point I stated, "evidence of good character, taken in conjunction with all the other evidence before you, might be sufficient to create in your minds a reasonable doubt."

Mr. Ford. And I think the other expression, in the Egan case, is: "where, without it, you may have been convinced of his guilt."

That is to say, where, without it, had it not been introduced, they may have been convinced, and so on.

I think that is an element in the Egan case, your Honor, as I recall it.

That is the only thing I want to call to your Honor's attention.

The Court. Have you anything to say to that, Mr. Kelley?

1166 Mr. Kelley. Well, I believe the charge is within the Egan rule.

Mr. Ford. I think it is, with that exception.

The Court. There is only one thing about it; to put it in at this juncture gives a false picture.

Mr. Ford. That is true. I didn't know whether I heard your Honor or not, and that is why I came up here.

The Court. Yes, sir.

Mr. Kelley. The Government has no comment.

Mr. Ford. I have no other comment to make, your Honor.

The Court. I think I will let it stand, Mr. Ford, under the circumstances.

Mr. Ford. All right, sir.

(Counsel returned to the trial table.)

The Court. There being nothing further at this time, I will say further to you, ladies and gentlemen of the jury, that you may now retire to the jury room to carefully and deliberately consider this case in the light of the evidence adduced and the instructions which I have given you.

After reaching the jury room, you will select a foreman

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from among your group, who will represent you when you return to the Court with your verdicts.

Before you retire, I will ask the two alternate jurors to remain, please.

Mr. Kelley. May it please the Court,——

1167 Mr. Ford. May we approach the bench?

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

Mr. Kelley. I move that the exhibits received in evidence be sent to the jury during their retirement.

Mr. Ford. I object.

The Court: I will not give them to the jury at this time, but I will give them the indictment.

Mr. Ford. Oh, yes.

* * * *

1169 *Verdict of the Jury*

(At 4:40 o'clock p. m., the jury returned to the courtroom, and returned their verdicts as follows:)

The Deputy Clerk. Are you the foreman of the jury, sir?

The Jury Foreman. That is right.

The Deputy Clerk. Has the jury agreed upon a verdict?

The Jury Foreman. We have.

The Deputy Clerk. What say you as to the defendant Carl Aldo Marzani on count 1 of the indictment?

The Jury Foreman. Guilty.

The Deputy Clerk. Count 2 of the indictment?

The Jury Foreman. Guilty.

The Deputy Clerk. Count 3 of the indictment?

The Jury Foreman. Guilty.

The Deputy Clerk. Count 4 of the indictment?

The Jury Foreman. Guilty.

1170 The Deputy Clerk. Count 5 of the indictment?

The Jury Foreman. Guilty.

The Deputy Clerk. Count 6 of the indictment?
The Jury Foreman. Guilty.
The Deputy Clerk. Count 7?
The Jury Foreman. Guilty.
The Deputy Clerk. Count 8?
The Jury Foreman. Guilty.
The Deputy Clerk. Count 9?
The Jury Foreman. Guilty.
The Deputy Clerk. Count 10?
The Jury Foreman. Guilty.
The Deputy Clerk. Count 11?
The Jury Foreman. Guilty.
The Deputy Clerk. Members of the jury, your foreman says you find the defendant Carl Aldo Marzani guilty on counts 1 through 11, and that is your verdict, so say you each and all?

(The members of the jury responded affirmatively.)

• • • •

1215 *Motion for New Trial*

The defendant moves the court to grant him a new trial for the following reasons:

1. The court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.
2. The verdict is contrary to the weight of the evidence.
3. The verdict is not supported by substantial evidence.
4. The court erred in sustaining objections to questions addressed to witnesses.
5. The court erred in admitting testimony of witnesses to which objections were made.
6. The court erred in charging the jury and in refusing to charge the jury as requested.
7. The court erred in denying the defendant's motion for mistrial.

CHARLES E. FORD,
Attorney for Defendant

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1217 *Come as well as the* Attorney of the United States, as the defendant in proper person, according to his recognizance, and by his attorney, Charles E. Ford, Esquire; and thereupon it is demanded of the defendant what further he has to say why the sentence of the law should not be pronounced against him and he says nothing except as he has already said; whereupon it is considered by the Court that, for his said offense, the said defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) year to Three (3) years.

• • • •

EXCERPTS FROM TESTIMONY AND PROCEEDINGS

J. Anthony Panuch

260 was called as a witness for and on behalf of the United States and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kelley:

• • • •

Q. State whether or not in 1945 and in 1946 you were an employee of the State Department. A. I was.

261 Q. In what capacity? A. Served as Deputy Assistant Secretary for Administration.

Q. How long did you so serve? A. From October 28, '45, to January 23, 1947.

Q. Since the date you last mentioned, have you been an employee of the Government? A. No.

Q. You resigned? A. I did.

• • • •

269 Q. State whether or not the defendant, Carl Aldo Marzani, was ever officially brought to your attention from the standpoint of a potential security risk. A. Yes, sir.

• • • •

271 Q. State whether or not you ever directed your assistant, Colonel Fearing, to request Mr. Marzani's resignation from the State Department. A. I did.

• • • •

272 Q. Will you approximate for us, or give us as near as you can, the time you did direct your assistant to request Mr. Marzani's resignation? A. It was at a meeting in the last part of April, I would say around April 30, of 1946.

Q. Some time thereafter state whether or not Mr. Marzani came to your office or sought an interview or conference with you. A. Mr. Marzani requested an interview with me in the latter part of May of 1946.

Q. And was that subsequent to the time you had directed Colonel Fearing to request his resignation? A. Yes, sir.

Q. Now will you refer to the time that Mr. Marzani requested a conference with you? State where it took place, whether or not anyone else was present, and, if so, name them and state what occurred at that time between you and the defendant. A. I fixed the time of the conference at about June 1, 1946.

It was in the morning, at about 10 o'clock. It was in my office.

273 Mr. Marzani and I were the only participants in the conference.

Q. Proceed. What was stated? Give us as fully as you can recall throughout that conference what was stated by both you and Mr. Marzani. A. Mr. Marzani came in and said that he had been called in by Colonel Fearing, and that Colonel Fearing had requested his resignation for security reasons. He told me that he told Colonel Fearing that he would take up with Mr. Russell's office; Mr. Russell being the Assistant Secretary for Administration, and I being his Deputy.

Q. Proceed. A. He asked me—

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Q. You are speaking now, by "he," of whom? A. Mr. Marzani.

He asked what it was all about, and asked whether I knew of Fearing's request to him, and I said I did, we had discussed it, and that Fearing was acting pursuant to my authority.

He said, "What are the security reasons?"

And I said, "Well, they are substantial, Carl."

And he said, "Well, what do you mean by 'substantial' "?

He said, "You know what this security business is around the State Department. A lot of this is hearsay, and so forth, and what are the charges? I am entitled to know the charges."

I said, "Well, the charges are rather serious,"
274 and I told him.

I said, "The first charge, Carl, is that you were a Communist, a member of the Communist Party in 1940 and 1941, and that you were a Communist organizer; that you operated in front organizations in New York."

The Court. Did you say "front"?

The Witness. Front organizations—"organizations in New York. That you operated under the alias of Tony Whales; that your wife was a member of the Communist Party and that her Communist Party name was Edith Charles; that you opposed conscription; that you made a false statement with respect to your financial resources to get a job with WPA, and that statement was made under oath; and that you signed a petition as a member of the Communist Party for the appointment—for the election of Earl Browder as Congressman."

By Mr. Kelley:

Q. What did Mr. Marzani reply at that stage? A. Mr. Marzani replied that there was nothing to the charges.

Q. Did he refer specifically to the charges that you enumerated to him? A. Yes.

• • • •

275 The Witness. Yes, sir. He took them up one by one.

By Mr. Kelley:

Q. What did he say in respect to them one by one? A. He said, "I am not and never was a member of the Communist Party."

He said, "I was never known as Tony Whales."

He said, "As you know, I am of Italian extraction, and a lot of people sometimes refer to me as Tony, and there may have been some confusion of me and my nickname with some other character by the name of Tony Whales."

He said, "I never participated in any Communist activity, although I was active in trying to promote the welfare of the East Side in New York."

He said, "My wife is not a Communist and was not a member of the Communist Party and was never known as Edith Charles."

276 He said, "If you call my wife anything, you might refer to her as a Socialist, but not a Communist."

About the WPA business, he said, "Sure, I said that I didn't have any money and that I was without financial resources, to get the job, because I felt that I was competent to do the job, and that whether or not I had money or not was not an ethical matter of consequence."

He said, "On the Browder business, sure, I signed a petition for Browder, but that was because I felt, as a lot of other people felt in New York at the time, that Browder had been unduly punished because he was a Communist and that this was an unwarranted interference with his civil liberties."

I said, "Well, Carl, that amounts to a general denial of these allegations, but what proof is there? How can you establish it?"

And he said, "Well, how often do I have to establish this? This is old stuff."

I said, "What do you mean 'old stuff' "?

He said, "Everything that you said to me just now was

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up before the Civil Service Commission when I was in the Office of Strategic Services."

Q. May I interrupt you? Was that the first time that you knew of that matter? A. You mean this Civil Service hearing?

Q. That his case had been before the Civil Service
277 Commission. A. Never heard of it before.

Q. Proceed. A. He said, "Well, I will tell you what happened. When I was in the OSS, the Civil Service Commission investigated me and the FBI investigated me and they rated me ineligible, and the matter was taken up with higher authority and was disapproved."

He said, "Then I, on my own motion to have this matter set at rest for all time, insisted on a hearing before the Civil Service Commission."

He said, "They had a hearing at the Civil Service Commission where every charge that you have mentioned to me today was considered; where I, and witnesses on my behalf, testified under oath, and a complete record of that testimony was made. As a matter of fact, I made certain corrections in the record in my own handwriting, and on that complete record these charges were thrown out the window and I was rated eligible with the Office of Strategic Services, and after that I was inducted into the Army."

Q. Did you have any further discussion on that occasion with the defendant in relation to ideologies of different political groups? A. Yes, sir.

Q. Relate what was said by him and by you in
278 that respect. A. Well, Mr. Marzani was quite critical of our security office and said that they were a bunch of country boys who didn't know the difference between a Communist, a liberal, an anarchist, and a Socialist, and that they probably lumped everybody in one—into the same category, no matter whether he happened to be a liberal or a Communist, and that it took a person of some sophistication and some experience and intelligence to make

a determination that would not be prejudicial to a Government employee with respect to reports of this character."

He told me something of his boyhood and the struggles that he had as a child, and something of his father's experience in this country, and of his education at Williams, and something about his travels, and told me that we were both Roman Catholics, and that it certainly would be a strange thing to have a Roman Catholic turn up as a Communist. And I agreed that that would be a pretty strange thing.

It was discussion of that character.

Q. Did you discuss the question of religion any further, and its bearing upon the charges—his view? Did he make any statements concerning it? A. About religion?

Q. About religious views. A. I think he said he was not a very active Catholic, but that is about all that
279 was discussed.

Q. How long did that conference take? A. That was a long conference. I think it took over two hours. You see, it was in the nature of an appeal from Fearing's request.

Q. What is that? A. It was in the nature of an appeal from Fearing's request for his resignation, and the man was appearing before me as Deputy Assistant Secretary, and he was entitled to have his day in court, and we just threshed the matter out thoroughly.

Q. Now, you have testified, I believe, that it was during the course of that discussion or hearing that you first became aware that the Civil Service Commission had at an earlier date passed upon charges relating to Mr. Marzani. A. Yes, sir.

Q. And that you learned of that for the first time from him in that conference? A. Yes, sir.

Q. At the close of that conference did you endeavor to determine whether what he had said in that respect concerning the Civil Service Commission was true? Did you endeavor to determine if what Marzani told you was true about those things?

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280 A. No. I would say within about two weeks thereafter I was at the Civil Service Commission in connection with another matter, and I talked to Mr. Malloy, who I believe is one of their associate counsel, and I said that we had this Marzani case and I would like to see the file; the record in that proceeding.

And he said he would have to get authority to permit me to see it, and he would let me know, and I think some time thereafter, in about a week, he called me on the phone and told me he would send over one of their investigators with the record, so that I could read it in my office.

Q. Did you read that record? A. Yes, sir. I read it very carefully.

Q. Did you learn that Mr. Marzani had been declared eligible following that hearing by the Civil Service Commission? A. Yes, sir.

Q. Now, as of the time we have come to now in your testimony, which would include the conference with Mr. Marzani, and your examination of the record of the Civil Service Commission, and your acquiring the knowledge that he had, in fact, following a hearing, been declared eligible, up to that time had you ever been aware of the existence of Archer Drew, a detective with the New York City Police Force? A. Never heard of him.

Q. Subsequently did you become aware of the existence of Archer Drew, a detective with the New York
281 Police Force?

• • • •

Q. Approximately when, to the best of your recollection? A. It was early in November of 1946.

Q. State whether or not agents of the State Department conducted an investigation relating to Mr. Marzani, subsequent to the hearing which you had with him and the conference about which you have testified. A. Yes, sir.

Q. Did you direct that the investigation be had? A. I approved of it, sir.

• • • •

Q. Counsel has asked for the time during which an investigation of Mr. Marzani by State Department
282 agents was going forward. A. I think several cases in the security group were reopened in August of 1946, one of which was Marzani's case, and I think directions—I think my directions to reopen it, the Marzani case specifically, came somewheres around September 15.

I asked counsel on his recommendation to go forward and develop the testimony as to whether or not Mr. Marzani was or was not Tony Whales.

Q. Now, in your Department of Investigation, in the State Department—now, don't state what you were told—did you ever learn or were you ever advised that a certain Archer S. Drew, a detective with the Police Department, was in possession of information relating to Marzani?

• • • •

A. Yes, sir.

• • • •

283 Q. Did the defendant, subsequent to the events which you have testified to, ever come to you and discuss a matter of his resignation? A. Yes, sir.

Q. Relate the time and circumstances. A. Mr. Marzani asked to see me some time early, I would say, in November of 1946, and he told me that he was fed up with the persecution of the Department so far as he was concerned and that he was going to quit, he was going to resign.

Q. Did it subsequently come to your attention that he had signed a resignation? A. Yes, sir.

Q. Did you do anything about the matter after learning of that? A. Yes, sir.

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284 Did you issue any order to any subordinates as to any action they should take with respect to Mr. Marzani? A. Yes, sir.

Q. What was it?

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The Witness. It was either November 15 or very shortly thereafter, that I directed Colonel Hamelstein, who was the head of the Office of Departmental Administration, and Mr. Jean, who was then acting as Chief of Personnel, to hold up all action on Marzani's resignation and to make no further payments to him by way of salary.

285 By Mr. Kelley:

Q. Why? A. At that time I received reports from the Police Department in New York.

• • • •

Q. Did the action which you just testified you took in relation to his resignation, was that based upon reports you had received? A. Yes, sir.

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287 *Cross-Examination*

By Mr. Ford:

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291 Q. Now, on your direct examination you recited a conversation you had with Carl Marzani on or about the 1st day of June, 1946. A. Yes, sir.

Q. I understood you to say that was an oral conversation between you and Mr. Marzani, just the two of you present, and that it lasted approximately two hours. It was quite a lengthy conversation? A. Yes, sir.

292 Q. Was what you said or what he said reduced to writing? A. No, sir.

Q. Now I will ask you whether or not on June 1, 1946, at that conversation, the following took place:

First, that Mr. Marzani walked in your office. He came to your office, did he not? A. Yes, sir.

Q. And is it not true that the first thing he said was, "Hello, Joe"? A. Yes, sir.

Q. And you answered, "Hello." A. It could be.

Q. And then the next thing Mr. Marzani said to you was as follows:

"I've been asked to resign. I guess you know that. I came over to tell you I wouldn't. I've done nothing wrong.

I've got pretty liberal ideas, as you know. I've never made any secret of my liberal ideas, but I'm not a member of the Communist Party. As to my ideas, well, you know them. I don't like the present policy of the State Department. It doesn't make any sense to me." Now, did he or did he not say that to you? A. No, sir.

293 Q. And that you made answer to him, "and other people"; did you make that statement to him? A. No, sir.

Q. That then Mr. Marzani said to you:

"We are talking as if the Russians wanted war with us and that is nonsense. Our big problem in America is to keep a depression away. Anyhow, as far as my loyalty is concerned, you know that I am not a spy or a traitor. I don't sell secrets. I don't even let them leak out to Drew Pearson or Walter Winchell, like J. Edgar Hoover does. If you want to fire me for being liberal, O.K., but let's know what we're talking about."

Now, did Marzani say that to you at that hearing, or did he not?

Mr. Kelley. Just a moment. If the Court please, I object to the line of cross-examination, unless counsel offers it on the basis for impeachment, and is in a position to state that the record he is reading from is an accurate one that he can substantiate in the record for that purpose.

Mr. Ford. I have not offered any record as substantial.

Mr. Kelley. It is beyond the scope of proper cross-examination.

The Court. I am curious to know when and where these notes were made.

294 Mr. Ford. These are mine, typed in my office from information I reliably have and which I sent over for at noon when this gentleman took the stand. These were typed in my office.

The Court. You received those from your client, sir?

Mr. Ford. Did I? Yes, sir. I expect to put him on the

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stand and show that, too, and I am laying a foundation to that.

Mr. Kelley. If that is the case, you are laying a foundation, then I have no objection.

Mr. Ford. Well, now, I am going to object to the Government stating that I am using some record. I have not offered a record. I am entitled to use any kind of papers so long as I don't introduce them, to frame my questions on cross-examination, and I am asking him about an interview he testified about on June 1, 1946.

The Court. All right.

By Mr. Ford:

Q. And then didn't you say to him:

"Well, Carl, I know you are all right. Hell, I'm an immigrant too. I know how you feel. We got this damn Congressional pressure on us, though. What about your using the name 'Tony Whales?'" Didn't you say that to him? A. No, sir.

295 Q. And then Mr. Marzani said to you:

"Oh, that business. We got it all threshed out at a Civil Service hearing. You probably got all the transcripts on it. I brought you a book of evidence I prepared for the hearing several years ago. I would like you to look at it." Did Mr. Marzani say that to you? A. He brought a book.

Q. Did he say it to you as I read it to you, in substance? A. I don't recollect anything that you have read to me, sir, except the one thing that he did say about the Civil Service Commission, and that he had a book, and he gave me the book.

Q. Don't you remember the part about "Tony Whales"? A. Well, now, if you are asking me to answer whether he gave it as you said it, I can't say yes.

Q. Well, let me repeat how I said it:

"What about your using the name 'Tony Whales?'" Didn't you put that to him? A. I said the accusation

is that you have operated under the name of Tony Whales.

Q. Then you said:

"Sure, I will. You know we got problems. Russell isn't too good on this stuff. He is a small town lawyer,
296 and when the heat's on, you know, he hasn't had to stand up in big court cases like I have in New York."

A. I never said that, sir.

Q. By the way, were you a lawyer in New York, or are you? A. Yes, sir.

Q. And then Mr. Marzani said to you:

"Well, I don't care too much about staying, but I don't like to quit under fire of being called a Communist."

Now, did Mr. Marzani say that to you? A. No, sir.

Q. And then didn't you say this to him:

"Hell, I've been called names too. I was an attorney for Amtorg; you know, the Russian agency, so I was called a Communist. I was attorney for German Railways, so I was called a Fascist. It's just this Congressional pressure—we'll let it ride and see what happens."

Didn't you say that, in substance, to Mr. Marzani?

Q. And didn't you further say:

"Hell, Carl, it's not people like you we worry about. The real rats are these so-called liberals—people
297 like Nathan, Pritchard, Cohen, these guys with the big mouths that see all the stuff and talk about it at parties. We are not worried about you. Those guys we got to get rid of."

Didn't you tell that to Mr. Marzani? A. No, sir.

Q. And then didn't Mr. Marzani say to you:

"Well, I guess." A. No, sir.

Q. And didn't you say to him:

"Are you a Catholic, Carl?" A. No, sir.

Q. And Carl said to you:

"Sure. I am not a professional Catholic, you know, but I was baptized and confirmed and I go to Church once in a while, but, as you know, I was born in Italy and I would like to keep religion and politics separate."

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Didn't he say that to you in this discussion? A. No, sir.

Q. And didn't you say to him:

"Well, I am a Catholic too, about the same way you are, I guess."

Now, didn't that and wasn't that in substance, or any part of it, the conversation he had with you which you have testified took place on June 1, 1945, in the State
298 Department? A. No, sir.

Q. Now, following that date in June, in about the month of July, didn't you have a conversation with Mr. Marzani in your office? A. I think I did.

Q. By the way, there were a lot of conversations you and he had in your office; wasn't there many, many occasions? A. No, sir.

Q. And in the latter part of July or August, while he was in your office, didn't you say to him:

"Carl, everything is O.K. You can stay."

Didn't you say that to him? A. When was this?

Q. In the latter part of July or the first part of August?

The Court. 1946?

Mr. Ford. Yes, your Honor. Following the date. I am bringing it in chronologically.

By Mr. Ford:

Q. Yes, didn't you? A. I think I did say "It's O.K."

Q. And then didn't Carl at that time say to you:

"I will have to think it over, and it is very nice of you to say that, but I have a career to make."
299 Didn't Carl say that to you? A. No, sir.

Q. Didn't he in substance tell you that it was very nice of you to tell him he could stay, but that he would have to think it over because he had a career to make? A. No, sir.

Q. And didn't you tell him that so long as he and Russell were around, everything would be O.K.? That so long as you and Russell were around, he, Marzani, would be O.K. in the State Department—didn't you tell him that? A.

I said so long as Russell and I were around, there would be no persecution. That is the part I remember.

Q. Now, I wonder if you didn't also testify on direct about a conversation in November—November 15, 1946? A. Yes, sir.

Q. At the time when Mr. Marzani filed his resignation; right? A. I think, Mr. Counselor, I think that was before I learned of his resignation.

Q. Now, as to that conversation, did it or did it not take place? Mr. Marzani came in your office and said to you:

"Hello, Joe, I've come to give you a surprise. I hope you won't like it."

And you said to him, "What?"

And he said to you, "I am resigning from the
300 State Department."

Did that take place? A. Not in the way you asked, sir.

Q. Well, you change it to the way it did take place and tell it. A. He told me that he was going to resign, at the end of the conversation.

Q. But it took place some time in that conversation, did it not? A. Yes, sir; towards the end of it.

Q. And didn't you say to him:

"Well, that's too bad, Carl. We'll miss you, but I think you are doing the wise thing. With a Republican Congress, there is going to be trouble." Then you turned and said: "Carl, what are you going to do?"

Didn't that take place, in substance? A. No, sir. I said, "Carl, it's up to you."

Q. "Carl, it's up to you"; is that right? A. Uh-huh.

Q. And then the next thing that he answered you:

"Motion pictures. I am going to make movies for the labor movement."

Didn't he tell you that? A. I think he did.

Q. And then you said to him:

301 "There should be lots of money in that." A. No, sir.

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Q. Then he said to you:

"Well, I don't know about money. There should be lots of fun. I've already made one film, you know." Did he tell you that? A. Yes, sir.

Q. And you said to him:

"No, did you? I didn't know that you had made one." Did you say that to him? Did you say to Carl:

"No, I didn't know that you had made a movie"? A. Well, he had been making several films. I didn't know which film.

Q. At that time you didn't know which particular film; right? A. I didn't know——

Mr. Kelley. Just a moment. Don't answer the question. I object to this as beyond the scope of the direct examination. Unless some indication is made here as to where this is material.

Mr. Ford. Same conversation; same date.

The Court. Which conversation is it?

Mr. Ford. Same date, same place, regarding his resignation of November 15, 1946.

The Court. Did you have a conversation with him at that
302 time, sir, as to movies?

The Witness. I would say it was prior to November 15, and he did mention a movie and he did mention a labor movement.

By Mr. Ford:

Q. Then at the conversation about his resignation, in November, 1946, you having testified in your direct examination you did have a conversation with him at that time, then he said to you:

"Cut the kidding, Joe. Of course you know. The film 'Deadline for Action.' Don't tell us you don't know."

Is that right? Did he state that to you? A. No, sir.

Q. Did he mention the name of the film "Deadline for Action"? A. I think he mentioned the name of the film, yes.

Q. Tell us what he said about the name in that connection. See if you can complete it. At this conversation he did mention the name of the film. Tell us how he mentioned it, whether you said anything to him, or what.

Mr. Kelley. Just a moment. The Government would like to renew its objection. If counsel desires to pursue this line of inquiry on this subject matter, I will have no objection so long as it is clear he is making the witness his witness for that purpose.

303 It is clearly beyond the scope of direct examination.

The Court. I think you have gone beyond the scope, sir. I will sustain the objection at this time.

Mr. Ford. May I have an exception, your Honor?

The Court. Yes, sir.

By Mr. Ford:

Q. And is it not a fact that you said to Mr. Marzani: "Why do you go into radical stuff"——

The Court. I will sustain an objection to that, sir.

By Mr. Ford:

Q. Then he said to you:

"Radical? Have you seen the film, Joe?"

Mr. Kelley. Same objection.

The Court. I will sustain you.

By Mr. Ford:

Q. And didn't you say, "No, I haven't"?

The Court. I will sustain an objection, and I am going to suggest to counsel if he has anything further in this matter, he approach the bench.

Mr. Ford. Indeed I have, your Honor, and I will be glad to.

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

Mr. Ford. I offer to ask the following questions:

304 May the reporter put them in the record, your Honor, my proffer?

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Starting right here, this one, and going over to the next page, which is just a couple.

The Court. Let me read it, sir.

Mr. Ford. All right, sir.

(The paper with questions thereon was handed to the Court.)

The Court. I will not permit between the lines which I have marked on this paper.

Mr. Ford. May he put that in the record, what you are omitting, your Honor?

The Court. Certainly.

Mr. Ford. I had better make the proffer.

The Court. Yes.

Mr. Ford. For the record: If I had been permitted, I would continue to ask the witness whether or not the following took place as part of the conversation he testified on direct examination he had with one Marzani in November, regarding his resignation:

"Marzani: Well, it's not radical. It gives the point of view of labor. It attacks monopolies and big business. That's why the papers scream at it. But it is not radical. It's a big success. Millions of people from coast to coast are looking at it. It's a hit."

And that then the witness, laughingly, said:

305 "It is, eh? How do you get a hit? I've put money in plays on Broadway and lost both times."

Then Mr. Marzani laughingly said:

"Give the money to me. I've never had a flop yet. Well, it's been nice working for you, Joe."

That's the part your Honor won't permit.

The Court. Yes.

(Counsel returned to the trial table.)

By Mr. Ford:

Q. And then as part of that same conversation, in November, you said to Mr. Marzani:

"When are you resigning?"

And he said to you·

"As of the close of business today. I want to make sure and agree that there is no pressure put on me to resign, and that I am not under fire."

Remember that? A. No, sir.

Q. And you said to him, in response:

"No, no, Carl. Good luck. We understand each other. We boys are in the big league."

And that Marzani then said to you:

"So long, Joe."

Is that the way it happened? A. I distinctly remember that I did not say that and that that did not occur.

• • • •

336 *George G. Gallagher*

was called as a witness for and on behalf of the Government and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kelley:

Q. State your full name, sir. A. George G. Gallagher.

Q. What is your occupation? A. I am a police captain in the Police Department of the City of New York.

• • • •

337 Q. How long have you been connected with the New York City Police Department? A. 21 years.

Q. What were your functions and duties in the Police Department during the years 1940 and '41? A. I was assigned in command of Unit 2 of the Sabotage Squad.

Q. What were the functions of that squad? A. That squad was designed to investigate subversive organizations in the City of New York.

Q. Now, in 1940, it is a fact, is it not, that Germany was then at war with England and France?

• • • •

338 A. Yes, sir.

Q. When was the subversive squad—Is that the

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correct word for it? A. The full name of the squad was "Special Squad Number 1," and the particular unit of which I was in charge was Unit Number 2.

Q. When was that organized? A. That was organized originally in September, 1939, and Unit Number 2 was organized in June of 1940.

Q. Will you please describe to the Court and to the jury the circumstances connected with the formulation of that squad?

• • • •

339 The Witness. At the direction of the Mayor, the Police Commissioner ordered that a number of young officers, both male and female, of the Police Department of the City of New York——

• • • •

be trained to infiltrate into organizations which might be considered subversive.

The Squad, in 1940, was in command of Deputy Chief Inspector George Mitchel, and he, together with the original members of the squad, investigated some 30-odd officers, 12 of them women, the remainder men.

After a thorough loyalty check, they were turned over to me and I checked them further and then trained them and ordered them to go into various organizations such as the German-American Bund, the Dante Alegares Society, which was an Italian-Fascist Society, the Communist Party, the Irish Republican Army, and various other organizations.

Mr. Kelley. Were the members selected to compose the squad in which you were in charge of varying racial backgrounds?

The Witness. Yes——

• • • •

340 We had Bohemians, and Yugoslavians, Costa Ricans; we had Jews, Negroes, Spaniards, practically all races and creeds were represented except the yellow race.

• • • •

Q. Now, what steps did you take to implement the work of that squad?

• • • •

341 A. The members of the squad were furnished by me or my assistants with false identification papers. They worked under aliases in most cases and were provided with passports—Excuse me, not passports but Social Security cards, taxi driver licenses, teacher's licenses, and such methods of identification to establish their identities under their false names.

Most of them lived away from home and penetrated into the organizations which I mentioned before. They were directed by me to advance themselves in those organizations by working as closely as they could with the people in the organizations and to try to capture such jobs as secretary of the organization, which would give them access to the lists of members' names and letters to provide them with the best opportunity for making notes of the activities of the organizations.

• • • •

344 Q. Are you acquainted with Archer Drew? A. I am.

Q. Who is he? A. Archer Drew was a member of Unit Number 2 from about July 1940 to January 1943.

Q. Did you have anything to do with his selection as a member of that unit?

• • • •

The Witness. Yes. I was given the privilege of accepting him or rejecting him.

• • • •

346 Q. Will you state the reasons for your selection of Archer Drew on your squad? A. I asked for a Negro member of the Police Department to be assigned to Unit Number 2 because the Communist Party had been attempting to induce Negroes to join their organization in New York City, and I——

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Mr. Ford. I object to that part, too, specifically, and move for a juror to be withdrawn and a mistrial declared.

The Court. I will deny it, sir.

Mr. Ford. May I have an exception?

By Mr. Kelley:

Q. When did you say that Detective Drew ceased to be a member of that squad under your command?

• • • •

347 The Witness. January, 1943.

By Mr. Kelley:

Q. And after that did he remain on the police force? A. He did.

• • • •

Q. Captain, state whether or not the names and identities of the members composing your squad were generally known throughout the Police Department itself. A. Every precaution was taken——

Mr. Ford (interposing). I object.

• • • •

348 (Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

Mr. Kelley. The Government considers that it is relevant and material to establish through this witness that such measures of secrecy were adopted concerning the identity of the men of this squad; that the policy was established not to disclose it even among its own members or to any Government investigators, to disclose the identity of the agent, and it does have a bearing here.

The Court. I think he has shown that, hasn't he?

Mr. Kelley. I don't think so. I want to ask him
349 specifically if their identity was concealed from agents, investigators of the Federal Government.

The Court. You may ask him, but I think it is duplication, sir.

Mr. Kelley. Its materiality is this, your Honor: The

fact of the matter, in the absence of the jury, is that investigators, during '42 and '43, could not learn the identity from the Police Department. All they could learn was, "We have information," that is all, sir, and they would not divulge identities so a flesh and blood witness could ever be obtained and brought before the commission. That is the fact of the matter.

• • • •

Mr. Kelley. I desire to show that there was an established policy of secrecy which went so far as to deprive Federal Government investigators of the knowledge of the identity of these men and members of the Police force generally, and I think it is material.

• • • •

350 Q. Can you testify to your knowledge that a policy was adopted in the Police Department of the City of New York to retain secret the identity of the members of your squad from police department members in New York generally and from any investigating agents whether from the Federal Government or a State investigating agency?

• • • •

351 The Witness. Deputy Chief Inspector Mitchel and myself, when the squad was organized, specified that the members of the squad were not to be known generally to other members of the Police Department, and until late in 1944, no other investigators, whether from the Army, Navy, or Federal Bureau of Investigation, were permitted to come in contact with our men, that is, their records were given to me or to my clerk at our office, and they never did go to headquarters or to the office of Special Squad Number 1.

Cross-Examination

By Mr. Ford:

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354 Q. Now, you listed the names of some particular organizations which you were to investigate, and after you named a few, you said "and various others." Give us the names of all of them, and what you meant by "various others." A. I will give them to you as best I can, Mr. Ford.

The American Youth For Democracy; The Teachers' Union; Transport Workers' Union; The Socialist Workers' Party; The Friends of the Soviet Union; American Peace Mobilization; the Clan-a-gael; the American Destiny Party. At the moment that is all I can recall, Mr. Ford.

Q. Now, you mentioned a Transport Workers' Union; were there any other unions that you investigated
355 with your squad other than the Transport Workers' Union and the Teachers' Union? Any other Unions?

A. National Maritime Union.

Q. What other unions, if any? A. May I make it clear, Mr. Ford, that we were not investigating the union. We were investigating——

• • • •

Q. What, if any, other unions was this squad or organization that you described at some length, investigating in addition to the National Maritime Union, the Transport Workers' Union, and the Teachers' Union?

• • • •

356 The Court. Did you investigate any other union, Captain?

The Witness. Offhand, I can't recall any.

By Mr. Ford:

Q. Would you say "no"?

The Court. He says he does not recall, sir.

The Witness. Possibly we did.

The Court. Now, you started to make some other answer, Captain.

You may answer.

Mr. Ford. Excuse me.

The Witness. In answering that question, we investigated the unions; I wanted to make it clear that we were investigating subversive elements within those unions.

By Mr. Ford:

Q. I will ask you whether or not you investigated the United Electrical Union. A. No, I don't recall ever having anyone in the United Electrical Workers' Union.

Q. I will ask you whether or not you investigated the Auto Workers' Union. A. No, I don't recall having anyone in that, either.

Q. I will ask you whether or not you investigated the Furriers' Union. A. I don't recall having anyone
357 in that. I would say definitely no.

Q. I will ask you whether or not you investigated the Steel Workers' Union. A. No, sir.

Q. Did you or did you not—the squad—investigate an association known as the National Association for the Advancement of Colored People? A. No, sir.

Q. Did you or did your organization investigate the American Negro Congress? A. Yes, sir.

Q. What? A. National Negro Congress.

Q. The National Negro Congress, did you investigate that organization? A. Yes, sir.

• • • •

430 *Louis O. Harper*

was called as a witness for and on behalf of the United States and,

• • • •

Direct Examination

• • • •

Q. Mr. Harper, will you please state your age, your residence and your present occupation? A. I am 45 years old. I live in Chicago, Illinois; 940 East 133rd
431 Street.

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Q. And your present occupation? A. I am presently employed by the Cooperative Movement in the field of educational work.

Q. What has been your previous occupation prior to the entry into the field last named? A. I was a schoolteacher.

Q. During what period of time? A. Well, I was teaching in Chicago from October, 1944, up until February of this year.

Prior to that I have taught in other places throughout the country, public and private schools.

Q. Going back about how long? A. Well, I started teaching in 1923.

Q. Have you taught constantly? A. No, I haven't. I didn't teach—well, there were breaks in the teaching years. Some years I did insurance work and I went back to school at times. I worked——

Q. Did you obtain a master's degree from Northwestern University? A. I did. I went to Northwestern University in 1937, '38, and '39.

Q. Did you live in New York City at any time? A. I lived in New York City from September, 1939, until December, 1941.

432 Q. Where did you move in December, 1941? A. I moved to Washington.

Q. D. C.? A. Yes, Washington, D. C.

Q. How long did you remain here? A. I stayed here until July in 1944, when I went to Chicago.

Q. And you have remained in Chicago since that time? A. That is correct.

Q. Are you now a member of the Communist Party? A. No.

Q. Were you ever a member of the Communist Party? A. Yes, I was.

Q. When did you first join? A. 1932, I believe. Yes, it was 1932, the year of the election; Roosevelt's first election.

Q. Are you acquainted with the defendant in this case, Carl Aldo Marzani? A. I am.

Q. When, as closely as you can state in point of time, did you first make his acquaintance? A. It was in New York and it was in the latter part of—I will have to rehash this. I was working in New York with the Carnegie Corporation from September of '39 to May, '40.

I suppose it was in the—let's see. I came there in '40, December. It must have been about the latter part
433 of 1940, in the fall, or something. I can't remember exactly.

Q. Where were you living, Mr. Harper, when you first made the acquaintance of this defendant? A. I was living at 408 East 10th Street, New York City.

Q. Will you step over to Government's map No. 1 and indicate, after you examined it and orientated yourself, the location of your home at that time?

(The witness stepped over to the blackboard.) A. It was on East 10th Street, just beyond Avenue C.

Q. You are pointing to what juncture? A. Well, here is East 10th Street (indicating). It was just beyond Avenue C on East 10th Street.

Q. On the north or the south side of the street? A. North—south side.

Q. Do you know where the defendant Marzani was living at the time you first made his acquaintance? A. He was living on Sixth Street between Avenue C and Avenue B.

Q. On the north or south side of the street? A. On the north side of the street.

(The witness resumed the stand.)

Q. By what name did you first make the acquaintance of the defendant? A. My first—well, we called him Tony. At that time I knew him as Tony Whales.

434 Q. Did you come to know him under a different name? A. Yes. We were in two other organizations in which he was known as Marzani; Carl Marzani.

Q. Now, at the time when you first made the acquaint-

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ance of this defendant, were you in the habit of attending meetings of the Communist Party in New York City? A. I attended some. I attended meetings—well, I attended mass meetings that they had. I attended group meetings they would have.

Q. What kind? A. Group meetings. Small meetings in that particular neighborhood where I was living.

Q. Did you ever attend a meeting of the Communist Party at which this defendant was present? A. Yes.

Q. Did you ever attend a meeting of the Communist Party at which the defendant was present and at which there was also present a Negro by the name of Bill Easley? A. Yes.

Q. Have you come to know an individual whom you once knew as Bill Easley, under a different name? A. Yes.

Q. What different name? A. Well, I know him as Detective Drew.

435 How long has it been since you learned that the man you knew as Bill Easley is, in fact, Detective Drew? A. I learned it this past Monday when I met him here in Washington.

Q. Up until that time had you known the individual by the name of Bill Easley? A. That is right.

Q. Relate the circumstances and the time in connection with your making the acquaintance of Bill Easley? A. Well, I had been in New York working as a research assistant in education on the Carnegie Corporation study, the Negro and America. I was living down at 408 East 10th Street and when that job came to an end, the study was completed, I went to work in the Federal Building as a computer in the Coast & Geodetic Survey.

I was living here at 408 East 10th Street. It was a building that had only one other Negro family in it, a five-story walk-up building, and was very friendly with the family that had charge of the building.

I didn't take part in much activities, but I was invited down to a party on the first floor and there were other people present at that party, and I met Bill Easley.

Q. Were you associated with the organization known as the National Negro Congress at or about the time that you are now speaking of? A. Well, soon after having met Easley, he came to my home and we talked.

436 We had friendly relations and he told me that they needed me in——

• • • •

Q. State whether or not you participated with Bill Easley in connection with activities related to the National Negro Congress of the East Side of New York City. A. As Bill Easley informed me that there was a National Negro Congress group in operation on the lower East Side, I was at that time an ex-member of the National Executive Board of the National Negro Congress, and as such he was desirous to bring me into the activity of this group.

I agreed that it was, and became active in meeting with them in their National Negro Congress meetings. I helped them to draw other Negro people into the activities, and it was in that respect that my association with Bill Easley developed even more than just friendly. We were actually working together on a Negro Congress activity.

Q. Mr. Harper, did you ever attend a meeting in the presence of this defendant, held at the Church of the Living God, in New York City?

• • • •

438 The Witness. Yes.

By Mr. Kelley:

Q. Now, fix for us approximately, as exactly as you can, the time, the circumstances, and relate what took place at the meeting. A. Am I to elaborate?

The Court. Yes.

The Witness. The National Negro Congress at that time had been carrying on most of its activities up in that section of New York around mainly where I was living, but

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there was a large Negro residential group in the lower East Side, around East Broadway, in that territory.

We had not been able to make much contact with them. There were a few of the members who lived down in there and it was desirous that we hold a meeting down in that area to attract those persons, let them know what the program of the Congress was, and why it was to their interest to come in and be active in it, and for that reason we held this meeting down in the area there. We were able to secure the use of the Church——

439 The Court. What Church was it?

The Witness. The Church of the Living God.

By Mr. Kelley:

Q. Was the minister of the Church present? A. The minister of the Church was present at the meeting. We had this meeting there. At that time the chairman of our council group was a young fellow who was not very much of a public speaker. While he secured the Church and made the initial advances to get it, he did not chair the meeting because of his inability to be a platform chairman.

As I remember it, Bill Easley chaired the meeting and I was one of the speakers, and also present at that meeting was a representative of the Communist Party in that section; rather, a person representing the Communist Party.

Q. Who was that? A. Tony Whales.

Q. Is that the man seated here? A. That is right.

Q. Did Tony Whales speak at that meeting? A. He spoke at that meeting.

Q. Was he introduced by the name Tony Whales? A. He was introduced by Bill Easley as Tony Whales.

Q. Relate now the substance of what this defendant said at the meeting in the Church of the Living God. A. Well, the substance of what he said was the fact that

440 the Negro people were a minority. They had problems in relation—speaking of the problems that we of the Congress were working on; the question of rents, the inability to be permitted to live in certain places;

thrown out by landlords without any real provocation; and that their struggles were struggles that the Communists were concerned with, and that the Communists were willing to give them assistance; that the National Negro Congress was the national organization that the Negroes should join, and along that line.

Q. Now, did you attend at a later time a meeting in the home of this defendant? A. I did.

Q. Relate who was present so far as you recall, and the time as exactly as you can fix it, and describe what took place.

• • • •

The Witness. Present at that meeting were Louis Harper, Harry Palmer, Bill Easley; Negroes representing the National Negro Congress group. Harry Daniels,
441 Edith, Tony Whales, a fellow named Meyer Zanger; a fellow named Kaplan.

There were some others I am certain.

The Court. What was the date, approximately?

The Witness. It was in the spring, around some time in May, May of 1941, I think.

• • • •

Q. Who presided at the meeting, if anyone? A. Harry Daniels presided at the meeting. He was——

Q. What was his position? A. He was—I think he was the chairman of the executive committee of the Communist Party of that area.

Q. Now, relate what was said by those various persons present at that meeting. A. Well, the meeting was a meeting between the representatives of the Negro Congress group and the executives of the Communist Party of that area, to see what could be done to increase the growth of the Negro Congress and what was hampering its growth, and to iron out these difficulties.

In our work there, among the Negro people, we had

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found a number of them who resented the fact that there were whites attending our meetings. Some of our members were saying, "We can't get the Negroes to join the Congress because they say the Congress is the Com-
442 munist Party." And, well, we just had to iron that out to see what actually would be—what we could do.

At our Congress meetings at times members would actually carry on recruitment to the party.

Q. Members of what? A. Members of the Communist Party would carry on recruitment of people attending the Congress meetings interested in the question of rents and places to live and jobs and so forth, also questions of attempts to stop some of the indiscriminate brutalities that were being carried on against them in particular, and they resented the fact that there were whites there, saying that we were trying—some were saying that we were Communists, and we wanted to make it possible to continue building the Congress on the Congress program.

At that meeting criticisms were made of the work being done. Harry Daniels outlined the whole role of the Party and the Negro question, and at that meeting I took the privilege of outlining how the Communist Party could help us in building the Negro Congress; the role that the Party could play.

Q. Did this defendant participate in the discussion? A. He participated in the discussion to the exent of making criticisms of some of the points raised, pointing out the weaknesses of the position, stating that—his position was that we ought not to let the Red scare affect our work and his participation was a matter of a critical
443 analysis of some of the points raised. As I remember, he didn't raise any original points on it, but served as——

Q. Did the defendant participate as a representative of the N.N.C. or the Communist Party?

Mr. Ford. I object, as calling for a conclusion.

Mr. Kelley. If you know.

Mr. Ford. I object, because it is a conclusion.

The Court. Do you know whether he was a member of the Communist Party, sir?

The Witness. He operated as the representative of the Communist Party, so far as we know.

Mr. Ford. I move the last be stricken out as a conclusion "he operated as."

The Court. I will deny the motion, sir.

Mr. Ford. Yes, sir. Exception.

• • • •

Cross-Examination

By Mr. Ford:

Q. Are you a member of the Communist Party now? A. No.

Q. When did you cease to be a member? A. I ceased carrying membership in the Communist Party in 444 the year 1938.

Q. And since 1938 you have not been a member? A. I have not been a member of the Communist Party.

Q. Since that time have you attended meetings of the Communist Party? A. I have.

Q. And that was after you ceased being a member you continued, then; it that right? A. That is right.

Q. Now, let me take up with you, please, the American Negro Congress Organization.

You are a member of that; right? A. Not at the present.

Q. Were you a member of it? A. I am not at the present.

Q. When did you quit that organization? A. When I came to Washington.

Q. How long were you a member of the National Negro Congress? A. From the time of its foundation in 1936 until I just dropped out of activity when I came to Washington.

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Q. And why did you cease when you came to Washington? Why did you cease then to be a member of the National Negro Congress? Why? A. Some of the activities in which I became involved took me out of that
445 stream of relationships.

Q. Was is because you lost interest in any of the things that the National Negro Congress was advocating? A. It was not.

• • • •

Q. I would like to have you list some of the purposes of the National Negro Congress; what its objects were. A. In the founding of the National Negro Congress it was felt that there was not a militant enough organization representing the aspirations, desires, the well-being of the Negro people in the United States. Negro Congress was formed in 1932.

At that time the most vocal organization of the Negro people was the National Association for the Advancement of Colored People.

That was a period of great economic stress, the height of the depression. And many Negroes had come to feel that the NAACP was not militant enough as it had been in previous years, and so a call was sent out calling all organizations, Negroes, trade unions, churches, lodges, and friends of the Negro people, to come to a founding convention that was held in Chicago.

446 At that time when that call was sent out to the different organizations you have enumerated, like the churches and all, there was a response from those organizations, was there? A. That is right. They came together in Chicago in 1936, and we had a three-day convention in the big Eighth Regiment Armory.

The Court. Will you gentlemen approach the bench a minute?

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

The Court. Why are we interested in this National Negro Congress?

Mr. Ford. No. What I asked him was the objects of it, but he is telling how it was organized, which is different from what I asked him.

The Court. We are not concerned with that at all, sir. Whether it is the Knights of Columbus or somebody else, even.

Mr. Ford. With its objects, you mean?

The Court. Yes.

Mr. Ford. Well, yes, for this reason: I want to establish from him the purpose of the National Negro Congress, because he said at the meeting he had been asked at the Negro Congress that he met the defendant Marzani.

447 Particularly the one that was held at the Church of the Living God, and that at that time they discussed problems of the Negro, places to live in, being thrown out by landlords, and brutality.

This is all that the Government brought out on direct examination.

The Court. That is right, but that is related to the Communist Party and the tie-in. We are not concerned with this National Congress, sir.

Mr. Ford. It was at that meeting this was had.

I am going to show on cross-examination that this defendant, if he was there, was there because of the rents, that he was advocating these things and not communism—the defendant.

The Court. We will not go into this National Association for the Advancement of Colored People or the National Congress.

Mr. Ford. Excuse me, your Honor. I thought the Government, again, had introduced that subject in the evidence, and having introduced it, they introduced it in connection with a meeting held at the Church of the Living God, at which he says this defendant was present.

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The Court. I appreciate that, Mr. Ford, and you need not repeat it. I remember it. I remember what he said there.

Now, if you want to inquire about that meeting, all right, but we are not going into the organization and
448 desires and aims of this Congress.

Mr. Ford. May I have an exception?

The Court. Yes.

We are not concerned with that.

• • • •

The Court. Come to the bench again for a moment gentlemen.

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

The Court. I was talking of the general situation, Mr. Ford. I was not talking about the meeting.

Mr. Ford. I understood that, your Honor. I am not going to go into the meeting.

The Court. Right.

• • • •

449 By Mr. Ford:

Q. Now, Mr. Harper, you pointed out that when you lived in New York you lived in an area up in here (indicating on map). A. That is right.

Q. And that Mr. Marzani lived in that same general area; right? A. That is right.

Q. Now, Mr. Marzani—while you lived in New York, Mr. Marzani lived in the same neighborhood as you did; is that right? A. Yes.

Q. How many blocks away did you live? A. I lived on 10th Street and he lived on 6th. I lived between Avenue C and D, and he lived between Avenue B and C.

Q. It is a question of five blocks? A. Yes.

Q. Right? A. Yes.

Q. And on many occasions while you both lived in that

neighborhood, he would visit your house, wouldn't he? A. My home?

Q. Yes. A. No.

450 Q. Never has. A. Not that I remember.

Q. And you have visited him at his home, haven't you? A. I went to a meeting there.

Q. You visited at his home. You went to his home, didn't you? A. To a meeting; yes.

Q. Now, you said there were other organizations in which Mr. Marzani was a member. What were they? A. I was invited to become one of the vice-presidents of the East Side People's——

• • • •

The Witness. The East Side People's Committee was one, and the Committee to Smash Hitler and Defend America was the other one.

By Mr. Ford:

Q. And you were both members of those organizations; right? A. Yes.

Q. I am now directing your attention to the meeting at the Church that you spoke about. Now, at that meeting at the Church, is it or is it not a fact that Mr. Marzani was there as a chairman of the Defense Committee of

451 the East Side? A. There was no Defense Committee of the East Side at that time, that I know of.

Q. Did you know Mr. Marzani as a chairman or subchairman of the Defense Committee of the East Side? A. Not at that time.

Q. Any time? A. Later.

Q. When? A. Approximately just about two months after that meeting—about three months after that meeting; sometime in July, the Committee to Smash Hitler and Defend America was established.

Q. And Mr. Marzani—— A. And Mr. Marzani was the secretary of that, and I was on the executive board of that.

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Q. And at the meeting in the Church, did you or did you not hear Mr. Marzani speak to other members of your race relative to police brutality against the colored people? A. That is one of the things that we were having a meeting about, the question of against police brutality, for the right to live in areas, against evictions. Yes, he spoke.

Q. And he spoke and asked—did he not ask the members there, "Let us go to the authorities and see if we cannot stop police brutalities against the Negroes in that
452 neighborhood"? A. Those were the purposes set forth.

Q. And then in the meeting of the Church, didn't he say, "Let us go to the authorities and see if we cannot stop the landlords from throwing Negroes out of their living quarters on the streets"? A. Yes. That was the substance of our meeting. That was the thing that we were meeting for, was to get the people organized.

Q. And did he not speak at that same meeting at the Church and say there should be no discrimination against the colored people as to where they would live down there in the East Side and that they should not be segregated? A. I would assume that that was part of his——

Q. Do you recall other things at that meeting that Mr. Marzani said in defense of the Negro people as to their living and their habits and their working conditions, in their favor? What else, if anything, do you remember him saying at that meeting in Christ Church? A. I think that is the substance of our whole meeting.

Q. And at that meeting were there people other than members of the Communist Party; in this Church? A. There were Negro people there that we were trying to get into the National Negro Congress, people we didn't know. There was the minister, who we definitely knew was
453 not a member of the Communist Party.

Q. And were there people there, many people, who were not members of the Communist Party? Who

were of different religions and different nationalities? A. I don't know that I can answer that, because——

Q. If you know. If you don't know, say so. A. Well, there were Negroes and whites there.

Q. Now, you made the statement in your direct examination in substance, as follows:

"Don't let the Red scare hurt our work."

Do you remember using that expression while you were answering Mr. Kelley's question? A. The "our"——

Q. The question is, do you remember using that expression to Mr. Kelley? A. That those were some of his remarks?

Q. That is right, yes. A. Yes.

Q. And is it not a fact that Mr. Marzani at that time said to you all in that neighborhood, at that meeting, "don't let people calling us Communists stop us in our work to help and advance the Negro race in our neighborhood"? Didn't he say that? A. I can't remember the words, but that certainly could be the substance.

454 Q. And isn't it the substance that he said, "Let us keep on doing this work of helping the Negroes in these different capacities, regardless of what names they may call us"? A. That could be.

Q. What is your answer, sir? A. That could be.

• • • •

Redirect Examination

By Mr. Kelley:

Q. Referring to the meeting at the Church of the Living God, we have covered what several said.

What did the minister say? A. The minister spoke after the other speakers. He said that he was glad to see people beginning to think about the welfare of his people; that there were probably charges that they couldn't get in, but that his church would always be open to persons who were working for the betterment of his people; that he didn't care whether the people were Reds or not.

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He said, "I don't care whether you are Reds or not. If you are working for people's betterment, my doors will be open to you."

Q. About how long did Tony Whales speak there that night? A. Approximately about ten or fifteen minutes.

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455 *Recross Examination*

By Mr. Ford:

Q. And by ten or fifteen minutes you mean a formal talk, like taking a platform or a pulpit, or something, but that you saw Mr. Marzani around there among the people, talking, in addition to that, didn't you, in groups and at the front door, either coming in or going away? A. Well, all meetings, when they are over, people talk in groups.

Q. That is right. But how long did the meeting take place? I mean the whole meeting. Not how long did each man take to speak, but how long did this meeting take place? A. Oh, I would say approximately about an hour and a half of the meeting.

The meeting was called for eight o'clock and it got under way about a quarter to nine, and out by about—the folks on their way home around about ten. I don't know.

• • • •

456 Q. Now, that Defense Committee in which you were on the executive board and he was the executive secretary—

The Court. Are you going into the functions of the executive committee at that meeting, sir?

Mr. Ford. What they did at those meetings, he and Mr. Marzani, or Mr. Marzani and he.

The Court. No, sir.

Mr. Ford. May I have an exception?

The Court. Yes, sir.

Mr. Ford. And may I make the proffer in the record, so that I can say what I would have shown?

The Court. Yes, sir.

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows):

Mr. Ford. Had I been permitted to ask the question and gotten an answer, the witness would have testified in substance and generally as follows:

That he and Marzani worked as members of the Defense Committee and that they got together all classes of people, white and colored, of all different religions, of all different nationalities, and worked with those people for a considerable length of time in organizing them to join the war effort of the United States and to do everything within their power to help the United States in its war effort and in all of its phases.

The Court. You have talked to him, sir?

457 Mr. Ford. To who?

The Court. To this witness?

Mr. Ford. Have I talked to him? No; but that is my information.

Mr. Kelley. May I be heard in the record?

The Court. Yes.

Mr. Kelley. The Government would object on the basis that such testimony is not relevant or material to the issues in this case, and does not in any sense tend to impeach the witness and therefore would not even be proper if offered for that purpose.

Mr. Ford. That tends to show that it would be part of a whole picture tending to show his relationship, between this witness and the defendant.

The Court. I will overrule it, sir.

* * * *

458 A. Yes, sir. We asked people to join the National Negro Congress, East Side Council. We gave them the names and addresses of persons, some who joined that night, and those who didn't join that night, they were

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given names of persons who were the responsible leaders of the Council.

Whether or not there was any solicitation for membership in the Communist Party, that I don't know.

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459 *Archer S. Drew*

was called as a witness for and on behalf of the United States.

• • • •

Direct Examination

By Mr. Kelley:

Q. State your full name, sir. A. Archer S. Drew, detective, City of New York.

Q. What is the number of your shield? A. 1101.

Q. How long have you been a member of the Police Department? A. A little over eight years.

Q. How old are you? A. I am 39.

Q. Would you relate briefly for the Court and jury something of your background and education?

• • • •

460 The Witness. I was born January 30, 1908, in Portsmouth, Virginia. I attended the elementary schools there through to the seventh grade.

Then I went away to high school at St. Paul's, Normal industrial Institute, located at Lawrenceville, Virginia. I graduated in 1926.

In 1926, the fall, I went to the Virginia Union University, located at Richmond, Virginia.

There I stayed about a year and at the completion of that year I left school on account of the illness of my mother, who was then residing in New York City.

I then took my address in New York and I went to work for the J. M. Horton Ice Cream Company. I worked there as an office porter for the period of about two years.

From that time I went to work for the United States Trucking Corporation and I worked there until 1936, when I was employed as a United States Post Office employee as a temporary carrier.

As a result of an examination for patrolman of New York City, which I took in 1934, I was offered a job as a special patrolman for the Board of Transportation. I stayed there as a transit police until April in 1939, when I was called to the regular force of the New York City Police Department.

There I worked in uniform, assigned to the 73rd precinct, after graduating from the recruit school.

461 I worked in uniform about a month, and then I was assigned to the 12th Detective District. At the 12th Detective District, I stayed there, and also in the Burglary Squad, until 1940, when I was then assigned to the Undercover Squad of the City of New York Police Department.

At that particular time, in 1940, when I was assigned to the Undercover Squad, I was called to New York City Police Headquarters where I was questioned by Captain Mitchell and Captain Gallagher, as to my—

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TheWitness. As to my scholastic record and also as to my fitness for the new assignment.

By Mr. Kelley:

Q. Now state whether or not after you were appointed to that squad, you received orders concerning your duties and functions as a member of that squad.

Mr. Ford. Your Honor, without interrupting continuously, may it be understood my objection goes to all this?

The Court. The fact that he was on the squad, sir?

Mr. Ford. His instructions that someone told him something, because it was out of the presence of the defendant.

The Court. All right.

The Witness. I did.

462 By Mr. Kelley:

Q. What were they? A. I was assigned to join the Communist Party in Harlem. I was given that area of New York City. I was assigned operator's number 29.

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I was instructed to divorce myself from all ties with the New York City Police Department; that we were to operate strictly under cover. Our identities were not to be known to other members of the Party, our family or friends—that is, in relation to our work.

We had separate headquarters, a place that was known as the Martin Pearson Company, that was located at 226 West Broadway, and later we moved to 225 Broadway and we operated as the Merchandise Survey. Captain Gallagher was known as Martin Pearson and this was supposed to be the head of an advertising firm.

There we made our reports and any other contracts—we received our pay checks as well. We were not allowed to carry a shield, gun, or anything that would reveal us as being police officers.

Q. Were you furnished anything in the way of fictitious identification? A. Yes, I was. I was given the name of William Easley. I reserved for myself a room in Harlem which was the address of 111 West 117th Street.

I there took up my residence, although my legitimate home was in Long Island.

463 Q. Did you receive in the course of your membership on that squad any form of identification card that would indicate your job, your fictitious job,—

• • • •

Q. Did you receive any kind of identification card at all? A. I did.

Q. What was it? A. I received a Board of Transportation card in the name of William Easley and supposedly employed as a railroad clerk.

Q. Did you attempt to perform the functions which had been outlined for you in Harlem? A. I did.

Q. Relate with what result. A. No results at all.

Q. What do you mean? A. By that I mean that I did not contact the Communist Party in Harlem as I had been originally assigned.

Q. Then what did you do? A. I then went to Union Square, which was located at Fourteenth Street in Manhattan, and there after several days I did contact members of the Communist Party through conversation and more fraternizing with them.

more fraternizing with them.

464 Q. Now, what were your orders with respect to the making and filing of reports?

Mr. Ford. I object.

The Court. Very well. You may answer the question.

The Witness. My instruction was that any time I came in contact with any Communist Party member or attended a meeting; in fact, as to my daily activity I was instructed to make a report under the form, under the number which I have already submitted—29—and I was to take this report to our office which was located at either address I gave you on West Broadway or on Broadway, and there that this report was turned over to Captain Gallagher.

By Mr. Kelley:

Q. Did you type out any of your reports? Q. I did.

Q. Did you type all of them? A. No, I did not.

Q. What was the situation as to those you did not type? A. As to those that were not typed by me, I would write them out in longhand at home and I would take them to our office where we had stenographers there for that purpose to do the typing, and then after I would dictate these reports I would read them for their accuracy and turn them over to Captain Gallagher.

465 Q. By "office" do you mean your undercover office? A. That is right.

Q. What form—I do not want to know anything that you put in your reports—did you have some established form of making up a report? A. Well, we did have an established form.

Q. Describe that form. Now, do not mention anything that you put in any particular report other than as to

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the form. A. On the left-hand corner of our reports we were supposed to put—in fact, we did put—

Mr. Ford (interposing). I object to this.

The Court. What did you put, sir?

The Witness. We put our assignment.

I put "C. P. Harlem", my code number, operator's number 29, and also the number of the report.

Then I would make out the body of my report and on the end of that report I would put the personalities which I had met.

By Mr. Kelley:

Q. Did you date the report, and if so, in what way? A. I would date that report in a numerical way by naming the number of the month and the day.

466 Q. Did some of your reports cover matters occurring on more than one or different days? A. They did. Sometimes a report would cover two or three days.

Q. Did you, without exception, divide the reports according to days? A. I did.

Q. Did you make copies of your reports or submit them only in the original form? A. I submitted them only in the original form.

Q. How frequently would you actually type up your report or write it in longhand notes, making up a report? A. Well, frequently, I would typewrite the report. I had a typewriter at home.

Q. I do not think you understood me. A. I did not, sir.

Q. How often did you prepare reports? A. Oh, I prepared a report each night. Sometimes I would carry it over into the following morning, but the majority of it was done at night.

Q. How frequently would you hand in the reports? A. I would hand in my reports about two or three times a week and I reported to our Undercover Squad office.

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503 *Archer S. Drew*

• • • •

Direct Examination—Resumed

By Mr. Kelley:

• • • •

508 Q. Now, Mr. Drew, independent of your reports, do you have a present recollection of all of those events in which you and the defendant were present?

509 A. I do.

Q. Have you, independent of your reports, a present recollection of the date of all occasions when you and the defendant were present, that is, without reference to your reports?

• • • •

The Witness. No, sir; I do not.

By Mr. Kelley:

Q. Independent of your reports, do you have a present recollection of all persons who were present at each of these events? A. No.

Q. Independent of your reports, do you have a present recollection of all that occurred and was said at each of these events?

• • • •

A. No, I do not, sir.

• • • •

Q. Now, when and where did you join the Communist Party? A. I joined the Communist Party on July 22, 1940, at the Sixth Assembly District for the Com-

510 munist Party, at 44 Avenue C, in Manhattan.

Q. Would you please go to the map, marked Government's Map No. 1, and point out where 44 Avenue C is?

(The witness stepped down to the blackboard.)

A. 44 Avenue C is located between Third and Fourth Streets, on the east side of Avenue C. It is about the middle of the block (indicating).

Q. What time of day or night was it when you went there? A. About 8:30 p. m.

• • • •

Q. Were you accompanied to 44 Avenue C by someone? A. I was.

Q. Who? A. A fellow by the name of Joaquin Pervlia.

Q. Did you see the defendant, Carl Marzani, at that place on that occasion? A. I did.

Q. Relate what happened when you arrived at 44 Avenue C. A. At 44 Avenue C I was taken into an office where I was introduced to one of the recruiting managers by the name of Jesse. The recruiting manager issued me an application blank and asked me questions as to
511 my name, address, where I was employed, and asked me who sponsored me.

He also informed me that the initiation fee would be 50 cents.

Mr. Ford. I object to all this on the ground of hearsay, your Honor.

The Court. Very well, sir.

What did you actually do?

I sustain the objection.

The Witness. I paid 50 cents for my initiation fee and I was given a Communist Party membership book.

By Mr. Kelley:

Q. Did you later on at the same place that evening attend a meeting? A. I did.

Q. Was this defendant present at the meeting? A. He was.

Q. Relate who were there and what was said during the course of that meeting? A. At this meeting that Edith Charles presided. Those in attendance were Joaquin

Pervlia, Tony Whales, Clem Dubrowski, Jesse, and myself.

Q. Were you introduced to this defendant on that occasion? A. I was.

512 Q. Who introduced you? A. Jesse.

Q. What was stated in the introduction? A. (Quoting): "This is a comrade, Tony. This is a new comrade, Bill Easley. Tony is a national committeeman."

Q. At that moment did you know him by any name other than Tony? A. No.

Q. Approximately how long after that did you come to know him by any additional name? A. About a month later.

Q. And by what name did you come to know him, additional name, then? A. As Tony Whales.

Q. Now, to go back to the events which you have testified occurred on the 22nd of July, proceed to relate further what was said at that meeting during the period of time that this defendant and you were present. A. At this meeting Edith Charles was making a speech about a parade that was going to take place on the lower East Side of Manhattan, and that this parade was for a peace demonstration; that this country was on the verge of entering an imperialist war, and now was the time to bring to the people the need for peace, and that the Communist Party,

513 in support of the Y. C. L., was going to stage a peace demonstration. That is about all I can recall—No, one other thing: and also was mentioned the fact that Congressman Marcantonio was going to have a meeting at Randall's Island, and the comrades were all urged to attend this rally and also to support Congressman Marcantonio in all of his endeavors.

Q. You mentioned the name of Edith Charles. Who was she? A. Edith Charles, I learned later, to be the wife of Tony Whales.

Q. Now, you mentioned the names of certain persons whom you say were present at that meeting. Are you able

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to testify that the names you have mentioned are all the persons who were present at the meeting? A. All that I have testified to were there. I may have left out one or two. I can't recall.

Q. Did you in your reports set forth the names of persons present at the various meetings?

• • • •

The Witness. I did.

By Mr. Kelley:

Q. Would your recollection be refreshed by reference to your report as to all of the persons present at that time? A. It would.

• • • •

522 Q. Mr. Drew, do you knew whether anything was distributed at that meeting to those present? A. Yes, sir.

Q. What? A. Leaflets and pamphlets.

Q. State whether or not you retained and attached to one of your reports such leaflet or pamphlet. A. I did.

Mr. Ford. We object to that, particularly as far as it is connected up with the report.

The Court. Very well.

By Mr. Kelley:

• • • •

Q. Were the leaflets or pamphlets that you referred to distributed in the presence of this defendant? A. Yes, they were.

Mr. Kelley. If the Court please, the Government offers in evidence the first yellow sheet—I should say the three yellow sheets attached to Government's Exhibit 33-A.

• • • •

The Court. Have you identified these three, sir?

The Witness. Yes, sir, I do.

523 The Court. When did you receive them?

The Witness. The night of that meeting of July 22, 1940, at 44 Avenue C.

• • • •

(The attached sheets referred to were thereupon marked Government's Exhibits 33-a-1, -2, and -3, respectively, for identification.)

By Mr. Kelley:

Q. Mr. Drew, do you have a present recollection of the date and place of the next Communist Party meeting that you attended? A. I do.

524 Q. When was it and where was it? A. It was July 23, 1940, at 44 Avenue C. It was a recruit training class.

Q. Was that the next day after the meeting you have recently testified about? A. Yes, it was.

Q. Where was that held? A. At 44 Avenue C, the Communist Party headquarters for 6th A. D.

Q. State whether or not the defendant was present at that time. A. He was.

Q. Relate what took place in the defendant's presence that night. A. The defendant was conducting a class for all the recruits in the Communist Party at the Sixth Assembly District. The course that he was instructing in dealt with race discrimination, white chauvism, and I can not recall the other subject, but it was a general subject. Those were the subjects the defendant was instructing in.

Q. Would your memory be refreshed as to the other subjects covered, by reference to your report? A. It would be, sir.

525 Q. Would you please refer to it for that purpose?

• • • •

Q. Is your memory now refreshed as to what that defendant said on that occasion? A. It is.

Q. Will you relate it? A. The other subject which I omitted in my previous testimony was the principles of Com—

Mr. Ford (interposing). I object to it. The question is what he said.

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The Court. You may answer the question, sir.

The Witness. Principles of Communism. The defendant spoke about how Negroes were being exploited and he stated that as a minority they should have their rightful place. He also praised unions, the C.I.O. and A.F. of L., and he also advocated that the unions have Negroes and that they would not have any discrimination in those unions.

526 They particularly praised the C.I.O.

By Mr. Kelley:

Q. Now, do you have a present independent recollection of the date and place of the next Communist Party meeting that you went to? A. No, I cannot, unless I refresh myself from my report.

Q. Will you do so?

• • • •

A. It was July 29, at the same place, 44 Avenue C. I went there to report on my activities on a recent petition campaign that was going to Nyack, New York. The mission was not completed, so I went to the section headquarters and reported to Tony, my organizer, and

527 told him that I had been there.

Q. Now, by "Tony," your organizer, who do you refer to? A. Tony Whales.

Q. This defendant? A. That is right, sir.

Q. All right. Relate the conversation that you had at that time with the defendant. A. I told my branch organizer, Tony, that I had met the group, and I went up to Nyack, but we arrived late, due to difficulty with the truck we went up in, and I told him that I was anxious to take an active part in the petition and in their work. The defendant replied that he was very pleased, and he could see that I had the makings of a good comrade.

• • • •

The witness Drew, in the course of his direct testimony referred frequently to his reports, identified as Government's exhibits No. 33 A-X for the purpose of refreshing recollection. The formal questions and answers pertaining to such refreshment have been eliminated from this Joint Appendix.

Q. All right, relate the circumstances and what
529 took place the next time you met this defendant. A. That was on August 6, 1940, at 44 Avenue C. I was there at a recruit class and after the class was over we were told to assemble to the main room where the section organizer Bob Appel, wanted to speak to everyone.

At this time Comrade Appel told us—

530 Q. Wait a moment. Was the defendant present at the time you are speaking of? A. Yes, sir. Comrade Appel told us that there was going to be a mass demonstration at Times Square and that we were to leave all identification that we possessed on our person at the Communist Party headquarters, in order that if the police did pick us up we would not have anything to identify us as being Communists.

They were divided in different groups. The branch organizers had a group. I was under the group of Comrade Meyer. I went along with Comrade Jean and her brother and we proceeded to Times Square.

Q. Wait a moment. Did the defendant accompany you? A. No, he didn't.

• • • •

531 Q. All right, relate the time and place you were present and what took place at your next meeting with the defendant. A. At our next meeting, it was on August 9, and it was at Avenue A and 14th Street, in Manhattan, and about 9 p. m. There the Branch F-2 of the Communist Party was holding a meeting against conscription and it was an Italian—that is, speaking in Italian—and the speaker was the defendant, Tony.

Those present at that time were different ones from our branch. I do not remember all, but I do remember Mary Fernandez as I was with her most of the time, and I did distribute leaflets that were printed in Italian. I could not understand the speaker, as he was speaking in Italian, but I do not know that from a previous arrangement—

Q. With whom?

Mr. Ford. I object.

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Q. With whom? A. With the defendant and others, that this meeting was to be aaginst conscription and that it was being conducted in Italian, in an Italian
532 neighborhood.

* * * *

Q. Relate the time and place, who were present, and what occurred at the time of your next meeting with this defendant. A. Our next meeting took place on August 12, 1940, at 44 Avenue C. There I was asked to turn in my membership book by the defendant, so that in order to change my name as to protect me on my job as being a member of the Board of Transportation or railroad clerk—

Q. Let me interrupt you. A. Yes.

Q. What name was on your membership card at that time? A. William Easley.

Q. Do you have your membership card? A. No, sir.

Q. Do you know where it is? A. No, sir.

Q. Was William Easley—have you testified that was your adopted name? A. Yes, sir.

533 Q. Now, relate what it was the defendant said to you concerning your card. A. The defendant told me, "I want your card in order that the name may be changed, so as to protect you on your job against anything that may happen by the Government if they happen to outlaw the Communist Party and they would find out that you are a member, it would throw you out of your job."

Q. Did you give him your card? A. I did, sir.

Q. Do you recall anything else that took place on that occasion between you and the defendant? A. No. We did attend a meeting that was in progress. Lena Powers was presiding at this meeting.

Q. Was the defendant at the meeting you are speaking of? A. Yes, sir.

Q. Relate what was said at the meeting he was at. A. Lena was advocating that the Communist Party support

a bus strike which was in progress in New York at that time along Avenue A, and she requested that the comrades, in the form of a delegation, go to the Mayor and ask that adequate service, and that the buses be restored immediately.

Also, we spoke about a general membership meeting to be held at Hennington Hall at a later date, and also there was a plea for funds, as it was stated that the funds in the Party were very low and that some form, such as a
534 dance or a raffle, would have to be conducted, so as to raise money within the Party.

Q. Now, you mentioned Lena. Who is that? A. That is Sema Sverdlove.

Q. Sema is her real name? A. Her real name, yes.

Q. How do you spell that name? A. S-e-m-a S-v-e-r-d-l-o-v-e.

• • • •

Q. Will you relate the time and place and who were present and what occurred in the presence of this defendant? A. The next meeting took place on September 3, 1940, at 44 Avenue C, about the hour of around 9 p. m. It was a regular branch meeting and Tony presided. He had just returned from his vacation with his wife, Edith Charles.

Q. You mean this defendant? A. This defendant, yes sir.

Q. Proceed. A. As the meeting was just about—shortly after it opened, Bob Appel came in and asked
535 to take the floor. He related that this was control week; that all the membership books, papers and records in the Communist Party were going to be burned, they were going to be destroyed.

This was an act so that there would be no record left to reveal his identity or any of the records pertaining to the Party.

Bob also stated that he wished we would pay our dues,

POOR COPY

as funds were very low, and then after Bob made his speech, Tony then took over. Tony asked for a delegation to go to Congressman Ellenstein's home. The Congressman from that district on the lower East Side of Manhattan.

We were to go there in protest of conscription, the act that was being fomented in Congress at that time. We were not to go as Communist members. We were to go as citizens.

Q. Now, what was the fact at that time with respect to the organizational structure of the Communist Party? A. Well, the organizational structure—are you referring from the national——

Q. You have mentioned the word "section" and you have mentioned the word "branch". Will you explain the meaning of those to us? A. Yes. The Communist Party has several sections that are located throughout the city within Assembly Districts. They take the same numerical number of Assembly District as is allotted by the
536 city and at the head of the section is a section organizer. He has an executive secretary, also executive educational director, and also executive daily worker manager.

After this section group organizer, they comprise a section executive committee. On that committee may be branch organizers and also various members of the section organization; any one of the officers of that section.

Q. Organizationally, what is the section composed of? A. The section is composed of many branches.

Q. Organizationally, what is a branch composed of? A. A branch consists of many groups.

Q. Now, what officers are connected with a branch? A. The branch organizer, the branch secretary, the educational director, the daily worker captain.

Q. Does the group have any leader or officer? A. A group does. It has a captain, a group captain.

Q. Now, you mentioned Bob Appel. Did he hold any

of the offices that you have mentioned at the time you are testifying about? A. He does.

Q. What was his office? A. He was the section organizer.

Q. At the time you are speaking of, did this defendant hold any office in that organizational structure? A.
537 He did.

Q. What was it? A. He was the branch organizer and also a member of the section executive committee.

Q. At a later time did he fill some other office in the organizational structure that you refer to? A. He does, yes.

Q. And what was that? A. That was the sectional educational director.

Q. Now do you have a present recollection of the next time that you saw——

Mr. Ford. I move that "he does" be stricken out.

The Court. When you say "does" do you mean as of the time you are speaking of that these respective men held offices?

The Witness. They did at their respective times; yes, sir.

By Mr. Kelley:

* * * *

Q. Relate the time and place, and who was present, and what occurred during the next occasion that you
538 met and talked with this defendant. A. The next meeting took place on September 5, about 9 p. m., at Avenue C and 10th Street.

Q. Was that in the building or outside? A. No, this was an open rally; open meeting.

Q. All right. Proceed. A. Presiding at this meeting was the defendant Tony Whales.

Q. Was there any platform there? A. A ladder was used.

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BLEED THROUGH

Q. What kind of a ladder? A. A regular step-ladder. I imagine about 7 or 8 feet high.

Q. Continue. A. The purpose of this meeting was to defeat conscription. Speakers were Edith Charles and Sid Weinstock, Communist Party members of the Sixth A. D.

Q. Is that the Edith Charles you referred to earlier as the wife of this defendant? A. It is, sir.

Q. Was this defendant present? A. Yes, sir.

Q. All right. Continue. A. The defendant opened the meeting by stating that this meeting was called
539 by the Communist Party of the Sixth A. D., that now is the time to run the neighborhood to defeat conscription; that he also urged that letters, telegrams, post cards, be sent to the Congressmen urging them that this bill must be defeated.

With that he introduced Edith Charles as the next speaker.

Q. Did he introduce her by that name? A. Comrade Edith was the name that was used.

Q. All right. Then what occurred? A. Then the speakers asked about—spoke about the evils of war, and so forth, and that this country was headed for a war, imperialist war, at that time, and that they urged that conscription be defeated at all costs.

At that time the next speaker was Comrade Sid Weinstock. Just before he was about ready to complete his speech, some of the neighbors brought the meeting to a rather hasty closing by throwing hot water in bags out of the windows. So we had to leave there and we went to another corner where some other groups were holding a meeting and a comrade by the name of Simon was holding this meeting.

• • • •

540 Q. Please relate the time and place, who were present, and what occurred at the next time you met and talked with the defendant. A. The next meeting

occurrred on September 16, at 44 Avenue C, about 9 p.m. It was a regular branch meeting of the Communist Party.

Q. Was this defendant present throughout that entire meeting? A. No, sir, he was not.

Q. Did he come into the meeting at any time? A. He did.

Q. Confining yourself to that period after he arrived, what occurred? A. Tony came into the meeting and asked to make a few remarks. He said that the expulsion of two comrades had come up and that he wanted to discuss it with the branch. He said that these comrades were not participating as Communists, they did not canvass, they were afraid to circulate as Communists, and he felt they should be expelled. What was the pleasure of the branch?

We discussed it and we recommended that the action be deferred, so in order that the comrades could go before the section executive committee.

• • • •

541 Q. Relate the time, place, who were present, and what occurred at your next meeting with the defendant? A. The next meeting took place October 14, 1940, at 44 Avenue C, about the hour of 9 p. m. There was a regular branch meeting of the Communist Party.

Q. Relate what took place in the presence of this defendant. A. The branch meeting had been in progress, and the defendant Tony came in and asked to make a speech. He told us that now the young men in the Communist Party must get into the Army so that we can disintegrate the morale of the men in order that the Communists may take over; that we could do a big job in helping the men with their grievances, forcing their fights, and teaching them Communism. In this way we could soon overthrow the capitalists and also take over control of the Army. We were to work on the officers as well as the men, and this job was especially assigned to young men of conscription age.

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Q. Had the conscription bill been passed by this time?

Mr. Ford. I object.

542 Mr. Kelley. If you know.

The Witness. Yes.

Mr. Ford. May I have an exception, your Honor?

The Court. Yes.

By. Mr. Kelley:

• • • •

Q. Relate the time and place, who was present, and what occurred at the time you next met the defendant. A. This event took place on Octover 17, at 44 Avenue C. As requested by Tony, I went there for the purpose of—to fold literature, to get the papers and pamphlets in order, and to give the office a general clean-up; that is, as far as the literature, to put it in its proper place, and so forth. While we were there we had conversation—

Q. Who do you mean by "we", now? A. The defendant, Lena Powers, and myself.

QQ. Did anyone else come to that meeting? A. No, just the three of us. We discussed the Charlie Chaplin film "The Great Dictator." I didn't see it, but

543 Lena had, and she related how wonderful it was, and so forth. Then the defendant asked me how I happened to join the Communist Party. I told him that being a Negro, southern-born, I was against discrimination, and so forth, and that I wanted to help my people as well as all minorities. That I had belonged at one time to the Democratic Party.

I said, "They didn't help us, and the Republican Party was no savior, they didn't help us," and I said, "The only people I could turn to were the Communists." That I was interested, and I wanted to be with them.

So the defendant asked me, he said, "Haven't you heard that Communists are radicals?"

I said, "No, I never heard that."

I said, "Well, how did you join?"

He said, "Well, I have always been a progressive and a radical."

He said, "Ever since I was a boy in Pennsylvania, my father was a radical and a leader. That I attended Williams College, where I graduated, and that I was the cause of my wife Edith Charles being in the party."

He said, "I got her in."

So at this time it was rather late. So we left our duties and went home.

• • • •

544 Q. Relate the time and place, who were present, and what occurred when you next saw the defendant. A. This was November 20, at 44 Avenue C, around about 9 p.m. Present at that time was the defendant, Bob Appel, and myself.

Just before the defendant came in—this was going on while he came in; we were burning the old records of the Communist Party. We were destroying all of the literature or anything that would designate us as being Communists. This was in preparation—

Q. Just a moment. Did you inquire in the presence of the defendant concerning the reason for the destruction of documents of that character?

Mr. Ford. I object, as leading.

The Court. Did you and the defendant have any discussion with reference to the burning of these papers?

The Witness. I do not remember, sir.

By Mr. Kelley:

Q. Proceed. A. At this time Tony came in and I explained to him the work that I was doing in organ-
545 izing the National Negro Congress. I explained how I had gotten the aid of several Negroes that had been Communist Party members and we were doing a very good job on getting the Congress started on each side.

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The defendant told me he was very pleased at the work that I was doing.

• • • •

Q. Relate the time and place, who were present, and what occurred when you next saw the defendant. A. The next event was a meeting that occurred on November 25, at 44 Avenue C, around the hour of 9 p.m. It was our regular branch meeting and at this meeting we discussed—the defendant was there—we discussed the Soviet picture, "The Great Beginning"; that the comrades were urged to take three tickets apiece for this picture and we were supposed to go in a body. Also, at this meeting, Mother Bloor's book, "We Are Many" was advocated and sold. Also at that time a new comrade came into the group by the name of Jean Turner.

Dues were collected, and after the business of
546 the meeting was over, the defendant, Tony Whales, adjourned the meeting.

• • • •

548 Q. Relate the time and place, who were present, and what occurred when you next saw and talked with the defendant. A. Our next meeting took place on December 2, 1940, at 220 Avenue A. That was the home of Comrade Joseph Lopez. This was a reg-
549 ular branch meeting of the Communist Party. The defendant Tony Whales was there and we issued out tickets—in fact, the defendant gave out tickets for the picture "The Great Beginning." He also advocated that we increase our recruit drive to get new members into the Party. He advocated that our funds be paid up and also that each comrade would have to bring in a new member; that we would have to submit a name, and this party's prospect would be inspected by the other comrades.

The defendant also announced that there was going

to be a general functionary's meeting to be held for the purpose of receiving the report on the Communist Party convention which had been held previously to this meeting.

Q. Have you indicated who were present there in the entirety? A. No, I have not, sir.

Q. Who were they? A. Joseph Lopez, Mary Farnum, Edith Charles, and I think Lena Powers was there, I am not sure of that right now.

Q. Would you be refreshed in that connection by looking at your report? A. I could, sir.

Q. Would you do so?

(The witness complied.)

• • • •

550 The Witness. Lena Powers was not there. The other was Clem DiGrazia. That was the name I had omitted.

By Mr. Kelley:

Q. What, if anything, did Edith Charles say at that meeting? A. I don't remember, sir, if she said anything then.

Q. Will you refresh yourself from your report and determine whether you can be refreshed in that connection? A. If it is in my report, I can, sir.

Q. Will you refer to it and see if there is anything in the report which will refresh your recollection as to anything that Edith Charles said at that meeting?

• • • •

The Witness. I have, sir.

By Mr. Kelley:

Q. Do you now have a recollection——

Mr. Ford (interposing). I object to anything about Edith Charles, the person not on trial here, and not named in the indictment.

The Court. Is this a part of the meeting attended by the defendant, sir?

POOR COPY

551 The Witness. Yes, sir.

The Court. Very well.

By Mr. Kelley:

Q. Have you refreshed yourself in connection with my suggestion? A. I have, sir.

Q. What is the fact? A. Edith Charles stated during the meeting that she had obtained a new job at Macy's, at 34th Street and Sixth Avenue, in Manhattan, at the book counter.

Q. That is, at a department store? A. Yes, sir.

Mr. Ford. I object to it on the ground that getting a job at Macy's book counter had nothing to do with Communism.

The Court. Do you desire to connect this up, sir?

Mr. Kelley. It is my desire to establish as far as possible what was said by the defendant at these meetings.

The Court. If you have no other purpose than that, sir, we will leave this.

Mr. Ford. May I, Your Honor, move that you withdraw a juror and declare a mistrial, because of the bringing out of that?

The Court. I will deny your motion, sir.

Mr. Ford. Exception.

The Court. I will instruct the jury that it is not
552 material to this case whether Edith Charles was in Macy's or where she was, other than in connection with the particular meeting that the witness spoke of.

By Mr. Kelley:

* * * *

Q. State the time and place, who were present, and what occurred at the occasion of your next meeting with the defendant. A. The next meeting took place on December 9, at 44 Avenue C, around the hour of 9 p.m. It was a regular branch meeting and Lena Powers was supposed to preside at this meeting but she turned the meeting over to Jean Turner. The defendant was present at

this meeting and he reported on the sales of the Daily Worker and also the Sunday Worker. He also announced that "We are now in competition with other branches." That is, to see who could sell the most papers.

And a deadline was set—Lenin Memorial Day. That was supposed to be the deadline for this contest.

553 The defendant also spoke about the Smith bill, which at that time was coming up in Congress, and he advocated the defeat of this bill.

Q. Did he state anything concerning what the bill provided? A. He did.

• • • •

Q. State it. A. The defendant stated that the Smith bill which would outlaw any strikes was against any of the principles of the Communists and that we were urged to defeat its passage by getting to the public, writ-

554 ing to our Congressmen, and the Communist Party members were urged to make leaflets and circulate these leaflets so that this bill would be defeated.

Q. Were any papers distributed at that meeting? A. Yes, they were.

• • • •

Q. I direct your attention particularly to what has been marked for identification Government's Exhibit 33-N-1 and Government's Exhibit 33-N-2.

Can you identify them? A. I can, sir.

Q. What are they? A. These are pamphlets, a pamphlet and a leaflet that was distributed at that Communist Party meeting of that date.

Mr. Kelley. The Government offers those two exhibits also, your Honor.

Mr. Ford. I object.

The Court. They will be treated as exhibits allowing counsel to examine prior to the receipt of it.

By Mr. Kelley:

• • • •

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555 Q. Relate the time, place, who were present, and what occurred when you next saw the defendant. A. Our next meeting took place on December 16 at 22 Avenue A in the home of Joseph Lopez. This was a regular branch meeting.

At this meeting the defendant presided and we reported on the number of recruits that we had taken into the Party.

Also we discussed the Soviet picture called "The Mannerheim Line."

Also we made some leaflets, or we were learning how to make leaflets, and also how to prepare a mimeograph machine and how to stencil. That was the chief purpose of that meeting.

• • • •

Q. Relate the time and place, who were present,
556 and what occurred when you next saw the defendant.

A. The next time was January 31 at 143 Suffolk Street. The occasion was a social affair sponsored by the National Negro Congress of the East Side. It was a dance.

During the intermission I was asked to be the chairman or master of ceremonies, which I did, and I introduced the defendant along with one other, Miss Pearl Trusty, who was also attending that affair.

Q. What was the substance of your introduction? A. The substance of my introduction was that I introduced Tony Whales, a member of the Communist Party.

• • • •

Q. State when and where and who were present and what occurred at the next time you met this defendant. A. The next time was February 11, 1941. I had the occasion to go to the Communist Party headquarters for the Fourth and Sixth A. D., which was located at 67 Clinton Street.

Q. Will you point out that location on the map, Government's Map No. 1?

(The witness stepped down to the blackboard to
557 indicate.)

A. 67 Clinton Street is located on the west side of Clinton between Stanton and Ritten Streets, about four doors from the corner and over a drugstore. The structure was about a four-story building and we occupied the second floor.

Q. What was the situation at that time with respect to the headquarters you have testified about at 44 Avenue C?

(The witness resumed the stand.)

A. At 44 Avenue C we had to move from there, we were unable to pay the rent; so we moved out, and we disbanded that place at that time.

So we amalgamated with the Fourth A. D., and then we were known as the Fourth and Sixth A. D.

Q. Now relate what occurred at the meeting that you have already identified. A. I went to 67 Clinton Street. There I met the defendant, who introduced me to the section organizer, the new one. That was Harry Daniels. I reported on the work I was doing in the National Negro Congress and the defendant suggested that we have in our organization whites from other organizations such as front organizations, and Jewish workers, and also people people from the peace movement we were urged to bring in.

Of course, the defendant stated that the Communist Party would be back of us and would give us all their assistance.

The Court. Back of who?

558 The Witness. The National Negro Congress, the organization of which I was head.

Also an appointment was made for a future date wherein the Communist Party members, that was Negroes, in the National Negro Congress, were urged, in fact, we were supposed to meet at 67 Clinton Street that follow-

ing Saturday afternoon with the section organizer and the defendant to give a detailed report on our activities and to formulate any future plan.

• • • •

Q. Relate the time and place, who were present, and what occurred when you next met and talked with the defendant. A. The next time was February 22, about 3 p.m., at 67 Clinton Street. I went there to make a detailed report to members of the section executive committee composed of Harry Daniels, Tony Whales, Meyer Zanger, and a comrade I only knew by the first name of Seymour.

I gave a detailed report on the National Negro Congress, that is, its membership, its aim, and a prospectus in general. I also discussed the literature for the National Negro Congress and in that end the section educa-
559 tional director of the Communist Party in that area, which was Tony Whales, was assigned to help me to compose leaflets and literature for the National Negro Congress, and we were to use the Communist Party's offices and also their machines.

Q. Where did you go after that meeting?

• • • •

The Witness. After I left that meeting at 67 Clinton Street, the defendant Tony invited me to his home to have dinner. I did go there and while we were there we discussed leaflets and pamphlets and literature for the Congress. We made up a leaflet for the Congress about discrimination——

By Mr. Kelley:

Q. What do you mean by "made up one"? A. That is, to form one, to put the body of it, to use your
560 own words in protest of something or to enlighten someone about something. You form a leaflet to be circulated.

• • • •

561 Q. Just a moment. Referring to the meeting which you testified you attended——

The Court. On the 22nd?

Mr. Kelley. On the 22nd of February, yes.

By Mr. Kelley:

Q. Was any document distributed at that meeting? A. Yes, it was.

• • • •

562 Q. Mr. Drew, I show you what has been marked for identification Government's 33-R-1 for identification. Can you identify it? A. I do.

Q. What is it? A. This is a leaflet that Earl Browder be freed and calling for a mass rally.

Mr. Kelley. I offer it in evidence.

Mr. Ford. I object.

• • • •

563 Q. What was the date and place of your next meeting with this defendant?

A. The next time was on February 28 at 643 Sixth Street, Apartment 5(c). That was the home of the defendant.

I went there to get some leaflets which I had to have printed and also I got the bill of cost.

The defendant at that time was having a Communist Party meeting at his home, so after I picked up the leaflets and the bill I immediately left and went to another meeting.

• • • •

Q. State the time and place, who were present, and what occurred on the occasion of your next meeting with the defendant. A. The next meeting took place on

564 March 18, 1941, at the Church of the Living God, 292 Monroe Street, Manhattan. The purpose was an open meeting sponsored by the National Negro Congress. The meeting was opened by me. I introduced the chairman, George Smith, who in turn introduced the following speakers:

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Louis Harper, Tony Whales, and myself.

We had music by the choir and also by one of the members of the Congress.

Literature, National Negro Congress literature, was distributed and a collection was taken up which was turned over to the Church.

Q. By what name was this defendant introduced at that gathering? A. As Tony Whales.

Q. You say certain documents were distributed at that meeting? A. Yes, sir.

• • • •

Q. Mr. Drew, I show you what has been marked Government's Exhibit 33-T-1 for identification. Can
565 you identify this? A. I do sir.

Q. What is it? A. It is a leaflet.

Q. Where did you obtain it? A. I obtained it at the Church of the Living God at this meeting, as was described.

• • • •

Q. Relate the date, place, and who were present, and what occurred when you next saw the defendant. A. That was on April 3, 1941, at 815 East Fifth Street. That was the home of George and Beatrice Smith.

This meeting was called by me of all the Communist Party members in the National Negro Congress, and we also included progressives from other organizations. Those in attendance were George Smith, Beatrice
566 Smith, Tony Whales, Regina Benzera, William Kerner, Harry Palmer, Harvey Maddox, and myself, and Osie Smith.

Tony stated that he could not stay to this meeting but that he announced that Louis Harper was going to conduct a class for the Communist Party with Negroes from the Congress and other organizations, and he wanted all the colored comrades to attend this class.

He stated that we needed studying, that we needed an

education along the party line, and that it would help our organization.

Q. Now, do you have a present recollection of the date and place of your next meeting with the defendant?

• • • •

567 A. It took place on April 4, 1941, at the home of George Smith, 815 East Fifth Street.

Those that attended this meeting—it was sponsored by the National Negro Congress, and those that attended this meeting were George Smith, Beatrice Smith, Harry Palmer, Harvey Maddox, Regina Benzera, William Kerner, and Osie Smith, including myself.

The Court. Excuse me. Was the defendant there?

The Witness. Yes, sir, the defendant was there.

At this meeting, a political discussion was given by the defendant, and the defendant spoke about how many Communists were in this country at this time, and he said that we outnumbered the number of Communists in
568 Russia during 1917 when the revolution took place.

He said that now was the time for revolution; that the Communists could have a revolution in this country.

He also advocated that the comrades attend Harper's class. Also the Workers' School for the betterment in our organization.

• • • •

Q. Relate the time and place, who were present, and what occurred when you next met and talked with the defendant. A. Our next meeting took place on May 28, 1941, at the home of the defendant at 643 East Sixth Street, Apartment 5(c).

The leading members of the National Negro Congress were to meet with the—or did meet with the secretary of the executive committee of the Communist Party. Those present were Louis Harper, Harry Palmer, Tony Whales,

Harry Daniels, Meyer Zanger, Emily, Frances Sutton. I think I named Sammy Kantor as being the other one who was there.

Q. Relate now what took place. A. Well, at this meeting we reported—when I say "we", Harper made
569 up a report for the National Negro Congress to the section executive committee, explaining why the National Negro Congress had its downfall on the East Side, and we had proposals how to rebuild the National Negro Congress without the visible aid of the Communist Party.

Our organization had declined, and the Communist Party was making up a program on how we could get the National Negro Congress on a footing again.

• • • •

576 *George Hewitt*

was called as a witness for and on behalf of the United States. See p. 254 et seq. of this Appendix for Hewitt's direct and earlier cross-examination.

• • • •

Cross-Examination—Resumed

By Mr. Ford:

Q. Mr. Hewitt, yesterday you will recall being called in here and producing the passport; right. A. That is right.

Q. And this is the passport here (indicating)? A. That is it.

Q. Now, the name that you used is William Jackson. Is that correct—as stated here (indicating)? A. That is right.

577 Q. Now, when you went to apply to the State Department for your passport, did you fill out a form similar to that (indicating)? Would you just look at it, please? A. I believe I did.

Q. Pardon me? A. I believe I did.

Mr. Ford. Mr. Clerk, would you mark this paper Defendant's Exhibit 5 for identification, please?

• • • •

By Mr. Ford:

Q. And in making out that form for the State Department, the birth affidavit, you went under the name of William Jackson? A. Yes. I was instructed by the party to do that.

Q. My question is, did you go under the name of William Jackson? A. William Jackson.

Q. And you filled that out that way? A. I believe so.

Q. And then at the bottom you will notice "Subscribed and sworn to before me."

Did you swear in that paper which you filed with the State Department that your name was William Jackson?

A. Yes, sir.

578

* * * *

Q. I hand you what has been marked Defendant's Exhibit No. 6. I will hand you that form, a passport application, and ask you to look over that. Did you fill that application out and use the name William Jackson? A. I don't recall this, sir.

Q. Do you recall making out a passport application? A. I do recall that a lawyer was assigned to me by the Communist Party, who did much of this.

Q. Well, now, was an application made out by the Department of State, a passport application? Did he use that, this lawyer you just referred to? A. I believe so; vaguely. Because I, at that time——

Q. I will ask you just to look at that and see the information it calls for and see if that will refresh your recollection. A. No, I don't recall.

579 Q. Do you recall making out and swearing to any other form, under the name of William Jackson, then Defendant's No. 5. A. All of this is vague.

Q. When you say "all of this is vague," what do you mean it is all vague? A. Because at that time I was rather young——

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The Court. What is the date of it, sir?

The Witness. 1930 or 1929.

By Mr. Ford:

Q. How old were you then? A. Well, about 15 years younger than I am now.

The Court. Are you 41, sir?

The Witness. 41.

By Mr. Ford:

Q. Would you say you were about 26? A. Maybe less than that.

The Court. Approximately that. It is a mathematical situation.

The Witness. But what I meant by "young" was that I was whisked into the Communist Party during a period that Stalin had demanded that they send Negroes——

Mr. Ford (interposing). If your Honor please, I submit this is not responsive.

580 The Court. No, that is not responsive.

By Mr. Ford:

Q. What do you mean when you say you are vague about the forms or the applications that you made out to the State Department? A. Well, I will explain, if you will permit me. I can't say it in one word.

The Court. Do you want the answer, Mr. Ford?

By Mr. Ford:

Q. Let me ask you this: I noticed you said that a lawyer was assigned to you by the Communist Party to make it out. Now, you are not vague about that, are you? A. No.

Q. Now, after you got the passport and you went to a foreign country, to go from that country to another country you had to get a visa, did you not? A. I went once, I believe coming out of Russia to the Berlin American Consulate, but at other times certain Communists who were couriers did all of this work. We had nothing to do with it.

Q. My question is, did you obtain and have with you when you traveled from one country to another, a visa

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issued by the country which you were leaving to the country to which you were going? A. Well, isn't this passport the visa. This was the thing I always was
581 given. This (indicating).

The Court. Is that the only document you received when you were traveling?

The Witness. Yes, sir.

By Mr. Ford:

Q. You had to take this back. This book was with you? A. That is right.

Q. Then as you went from one country to the other you had to take this book to the consul in this country, did you not, the country you were leaving? A. This was performed by a responsible comrade in charge.

Q. So that you did not appear with your book in front of a consul in the other countries as you were going? A. I remember once. I said the Berlin Consulate.

Q. Now, when you did that, you had to make representation to that consul, did you not, under oath, that you were William Jackson? A. That is right.

Q. Now, did you sign any passport application under oath? A. Well, I believe that concerned this, yes.

Q. Did you sign and swear to any passport application under oath in regard to this passport? A. Yes, sir.

582 Q. Did you make application at any time for any passport other than this? A. No.

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586 *Archer S. Drew*

• • • •

Direct Examination—Resumed

• • • •

Q. Mr. Drew, I believe you made reference at the close

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of your testimony yesterday to events that took place on the 28th day of May, 1941.

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• • • •

Q. Relate the time and place, who were present, and what occurred on the occasion of your next meeting with the defendant. A. The next meeting occurred on September 3. I had occasion to go to Communist Party headquarters at 67 Clinton Street, and there I met the defendant, Tony Whales, who informed me that Louis Harper had been made vice president of the Peoples Committee, the East Side Peoples Committee.

I told him I thought that was a very good move
588 and I suggested that some time Harper, being a member of the Negro Congress, that we should have have someone represented on that committee; so Harper was made a vice president of that committee.

• • • •

Q. Relate the time and place, who were present, and what took place on that next occasion. A. The date was September 22. It was about 10 p.m., at Mary Farnum's home, at 520 East 13th Street.

Q. Did you know her by any other name? A. I did.

Q. What? A. Mary Fernandez.

Q. What was her real name? A. Mary Fernandez.

Q. Continue. A. We were scheduled to have an executive committee meeting there of the Communist Party, but due to some unforeseen reason the meeting was
589 canceled; so I lingered there and I was talking to Mary when the defendant Tony Whales came in.

He was carrying some leaflets that he gave to Mary and told Mary that the comrades would have to distribute them, and Mary was given that responsibility.

I took some of the leaflets. I told him I would distribute some, and they were in regard to a parade of the nation-

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alities, and also an article from the Italian paper Il Progressio.

• • • •

Q. Mr. Drew, I show you what has been marked for identification Government's Exhibits 33-X-1, 33-X-2, and 33-X-3, and ask you whether you can identify them.
590 A. I can, sir.

Q. What are they? A. They are leaflets, sir.

Q. Where did you obtain them? A. I obtained these leaflets at 520 East 13th Street, at the home of Mary Farnum.

Q. Do you know how they arrived at that meeting? A. I do, sir.

Q. How? A. They were brought there by Tony Whales, the defendant.

• • • •

646 *Cross-Examination—Resumed*

By Mr. Ford:

Q. Now, what was the date that you said you received a membership card from the Communist Party? A.
647 July 22, 1940.

Q. And how long did you have possession of that card from July 22, 1940? A. I had possession about a little over a month or maybe a month and a half.

Q. And during that time, that month, you were visiting your headquarters somewhat regularly, maybe every day or sometimes every two days, or sometimes every three days? A. Which headquarters are you referring to, sir?

Q. Police, the squad headquarters. A. Yes, sir.

Q. And did you ever make a photostatic copy during that month of your membership card and leave the photostatic copy in your files at your squad headquarters? A. No, sir.

Q. Other than the name of—Is it Beasley, you said? A. Easley.

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Q. Other than that name, did you have any other name in the Communist Party? A. Yes, sir.

Q. What was it? A. William Johnson.

Q. And was that ever written on a membership card of any kind? A. Yes, sir.

Q. And when was it you got that card? A. I
648 imagine it was about two months after the original issue.

Q. And how long did you have that card? A. It was not very long, sir, I imagine about a month.

Q. Now, during that month that you had that card in that name, were you also visited at the headquarters the same as you had before? A. Yes, sir.

Q. Did you have a photostatic copy made of that and placed among your records? A. No, sir.

Q. Did you organize or help to organize a branch of the National Negro Congress in New York? A. I did, sir.

Q. And who, if anyone, helped you organize that branch? A. Louis Harper, George Smith, Beatrice Smith, Harry Palmer.

Q. And what date was that that you organized that branch? A. I don't know the exact date, sir.

Q. Will you give me approximately the date? A. I think it was around September of 1940.

Q. And were you one of the original organizers? A. Of the East Side Council; yes.

Q. Of the National Colored Congress? A. Of
649 the East Side Council; yes.

Q. Of that branch? A. Yes.

Q. Did you solicit memberships for that Congress? A. I did.

Q. And did you solicit that membership from the area around in the East Side; the lower East Side? A. I did.

The Court. I ask you to approach the bench, sir.

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

The Court. What is your purpose?

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Mr. Ford. My purpose is to develop that Harper, that all this time he was with Harper, a Government witness here, over quite a period of time, and that Harper, having already testified that he ceased to be a Communist in 1938, I am going to show by this witness, his testimony, that that is not so.

The Court. Well, let's get to that.

Mr. Ford. That is number one.

The Court. All right, sir.

Mr. Ford. The second phase of it is that he testified on the stand yesterday that after giving his history and his schooling, this witness on direct, he said he always had his people——

650 The Court (interposing). Who, this witness?

Mr. Ford. Yes, sir.

The Court. I don't recall that.

Mr. Kelley. And I don't recall that either.

Mr. Ford. Well, it is on that basis that I am saying that. I may be wrong.

The Court. Yes. That isn't my recollection.

Mr. Ford. But because I believe that will show that——

The Court (interposing). I will deny that part of it at this time, sir.

Mr. Ford. Yes, sir. And if the record turns out that I am correct, had I been permitted, I would have developed that he did the following things:

First, because of the testimony of the captain who organized the squad who said that the National Negro Congress was one of the organizations that he delegated them to investigate—I am going to show that he created, this witness, that organization—that he induced and had people other than Communists come and address the association; that the people he solicited were colored people and other nationalities; and,

Secondly, again, as to the meeting, he testified of the National Colored Congress being held in that church, and he described all of its details and what was stated by each.

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I wanted to develop all of those phases of it under
651 the heading of National Negro Congress.

The Court. I will not hear you on anything of that sort save those meetings where he specifically attended, sir, and where Mr. Marzani was in attendance.

Mr. Ford. That is your Honor's ruling?

The Court. Yes.

Mr. Ford. May I have an exception on this limitation for cross-examination?

The Court. Yes. I understand from the pleadings that the issue in this case is whether or not certain statements were made knowingly and wilfully and falsely.

Mr. Ford. What I have to say, your Honor, I will assume that is correct, and had the Government had that realization and limited their testimony to that realization, I would not have attempted any of this cross-examination, but what I am trying to cross-examine him about is all of the things the Government put into this case and discussed in this case, by witnesses in front of the jury, and it is only because of the fact that I think he went outside of it, that I should be permitted to go outside of it.

The Court. I agree with you, and the Court will permit you to go into anything which was brought out on any of these occasions as to which there is testimony, sir.

Mr. Ford. And I also offer these questions to
652 question his credibility, as a basis for testing his credibility.

The Court. I will not go into that. I will permit you to go into and attack his credibility as to anything that he has dealt with on those particular occasions.

I agree with you that we have gone afield, sir, and I agree with you that you can go to the extent of meeting those situations, but only as to those.

Mr. Ford. I have other questions written out which I worked on yesterday in order to save time today. If your Honor feels that before I cross-examine him on that——

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The Court (interposing). You have made a proffer at the bench, sir. Have you finished that?

Mr. Ford. All right. Yes, indeed.

The Court. All right, sir.

• • • •

653 Mr. Ford. I would like to ask this witness whether he did or did not testify yesterday that he was out always to help his people, whether he testified that way.

The Court. I don't think I will permit that.

Mr. Ford. All right, sir. And by people, you meant colored people?

The Court. Yes. It does not matter whether they are colored or Italian or Jew or what.

Mr. Ford. In view of the fact that he did it is the only reason.

654 The Court. I don't think he did it.

(Counsel returned to the trial table.)

By Mr. Ford:

Q. Now, on yesterday when you used the word "comrade" in connection with a person's name, do you mean by the use of that word that they are a member of the Communist Party and that is why you call them "comrade"? A. I did, yes.

Q. And yesterday, you mentioned many names which you used the prefix "comrade" so-and-so in front of correct? A. That is right, sir.

• • • •

656 Q. Now, you testified—and I will direct your attention and locate you to this occasion—when there
657 was a meeting of the National Negro Congress in the Church of the Living God; do you remember that incident now? A. Yes, sir.

Q. Now, at that meeting were there people other than Communists there at that meeting? A. Yes, sir.

Q. And were those people from the neighborhood? A. I presume so; yes, sir.

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Q. And did any speaker at that meeting get up and discuss Communism? A. No, sir.

Q. In 1940 and 1941—and I am directing your attention to a man you have identified as Harper now, the Harper that you mentioned, is that the same Harper who is a witness in this case? A. Yes, sir.

Q. Now, in 1940, what communistic activities did Harper join in with you, just generally? A. None that I know of.

Q. In 1941 what communistic activities or meetings did Harper join in with you, to your knowledge? A. I don't recall any, sir.

Q. In 1940 and 1941, was Harper a member of the Communist Party? A. I don't know that, sir.

• • • •

659 By Mr. Ford:

Q. Did you, in November of 1940, make a statement that you were going to the home of Comrade
660 Louis Harper? A. I did, sir.

• • • •

663 Q. In December did you make an oral or a written statement—December 1940—to the effect that you were going to Comrade Louis Harper's home? A. Well, I can't recall, sir. If I could see my reports, maybe I could refresh myself.

Mr. Ford. May he look at his report?

The Court. Yes, sir.

(The report was handed to the witness.)

The Witness. I did, sir.

By Mr. Ford:

Q. Did you, on May 28, make an oral or written statement to the effect that "Harper and I are responsible to the C. P. for development"?

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664 The Witness. Yes, sir; I did, sir.

• • • •

665 Q. And did you, on the same date, make a written or an oral statement that Harper outline the role of the Party in connection with the Congress? A. Yes, sir.

Q. By the way, when you use the initials "C.P.", you mean Communist Party? A. I do.

• • • •

The Court. Do I understand you are testing him now for the purpose of credibility?

666 Mr. Ford. Yes, and to use his admissions against him when he said Harper was not a member of the Party.

Mr. Kelley. He said he didn't know if he was a member of the Party a few minutes ago.

Mr. Ford. Then this would contradict that he did know. This would show that he did know it. Either way it would show a difference.

• • • •

667 Q. In 1940 and 1941, whenever you heard a person speak against police brutality, did you consider that person a Communist?

The Court. Just a minute. You need not answer that question.

Mr. Ford. May we approach the bench?

The Court. Yes.

668 (Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

Mr. Ford. I was going to ask him the following, separately:

When he heard a person speak against police brutality, did he consider that person a Communist because of that expression of thought.

Then the second one was: "When you heard a person advocate a vote for Congressman Marcantonio, did you consider that person a Communist because of that expression?"

"If you heard a person speak that people should get together for the purpose of maintaining peace, did you think that person a Communist?"

"Did you, if a person went to a Congressman's house as a citizen to protest proposed legislation, would you consider that person a Communist because of making that effort and asking the Congressman to do that?"

"If a person went to see the moving picture 'Great Dictator' with Charlie Chaplin, did you consider that person who saw the movie or who suggested that others go see it be considered by you a Communist?"

"Would you consider a Communist a person who was opposed to the Smith bill, which would outlaw strikes, to which you referred in your direct examination?"

669 These topics, your Honor, are things that he spoke about on his direct examination, and that is why I framed them particularly in that way.

The Court. I will overrule them as not being material to this issue.

Mr. Ford. May I have an exception?

The Court. Yes.

(Counsel returned to the trial table.)

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751 *George Hewitt*

was called as a witness for and on behalf of the defendant

Direct Examination

By Mr. Ford:

Q. Now, I am handing you Defendant's Exhibit No. 7, which consists of five photostat sheets, and I wish you

would first look at them—and by the way, some of these sheets, while they look blank, they have something written on the back of them—would you take those and look at those sheets, please (handing papers to the witness)? A. Yes, sir.

Q. Now, I will refer to the first sheet, and for identification, it reads:

"Application for Renewal of Passport";

and I will ask you whether or not, if you will start at the top and go down through it, whether your handwriting appears on that application. A. This one (indicating).

Q. And he points out "Signature of applicant, William Jackson."

Now, I will ask you as to the second sheet—I will ask you as to the third sheet, which is headed:

752 "Passport Application";

and I will ask you if you will point out your handwriting as it appears on that sheet. A. This one (indicating).

Q. And he points out "William Jackson, Name in full."

Now take the second handwriting. A. This is it (indicating).

Q. Blackville, South Carolina? A. Yes.

Q. How about the date? A. Date?

Q. June 27.

Now, what other handwriting? Is that your handwriting (indicating)? A. That seems to be scribbled a bit there.

Q. Yes. Well, whatever your handwriting is. A. Right there is my handwriting (indicating).

Q. That is "Lake Tuxway"? A. That is right.

Q. And the next handwriting right underneath that, the words "not living". A. Also my handwriting.

Q. And the handwriting "deceased"; is that yours? A. No; that is not mine.

753 Q. Now, going down, we come to this, and he

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identifies the following as his handwriting: "555 Madison Street." A. Yes.

Q. Is the word "Brooklyn" yours? A. That is right.

Q. And the word "New York" yours? A. That is right.

Q. Now, going down further, where is the next place? A. I don't see any other place.

Q. I will ask you whether "Traveling with orchestra, England, France," is yours. A. No. That is not my handwriting.

Q. That is not yours? A. No. That is not mine. That is not my handwriting.

Q. That is not yours? A. No. That is not my handwriting.

Q. Now, turning over to the fourth sheet, and I will ask you, up on the top where it says "Oath of allegiance," underneath that, is that your handwriting, "William Jackson"? A. That is my handwriting; yes.

Q. Then underneath that it has a description of the applicant.

Now, is the "5" and "feet" yours? A. Yes.

The Court. By "his," do you mean his handwriting, sir?

Mr. Ford. Yes; his handwriting.

754 By Mr. Ford:

Q. And is "Inches, 5," yours? A. Yes.

Q. And the age "24," is that yours? A. Yes.

Q. And hair; "black"? A. Black.

Q. And brown eyes? A. Brown eyes.

Q. Place of birth, "Blackville"; that isn't yours? A. No, sir.

Q. And North Carolina? A. No, sir.

Q. How about the date of birth? A. That is not my handwriting.

Q. "Salesman—Helix Company"; is that yours? A. That is not mine.

Q. How about the "unknown" part? A. That isn't mine.

Q. Down underneath that appears the name again, "Willie Jackson." A. That is mine.

Q. And "555 Madison Street"; is that yours?

755 A. That is crossed out; but that is mine, yes.

Q. And "555 Madison" is crossed out? A. That is right.

Q. And then "City and State," it says "Brooklyn, New York." Is this your handwriting? A. That is right.

Q. And that likewise is crossed out, isn't it? A. Yes, sir.

Q. And then down here is a "George Lagree, 24." A. That isn't mine.

Q. Now, taking up the first sheet again, where were you when you made that out, that first sheet? A. Let's look at it to make sure.

Q. Just this first sheet I am asking about.

• • • •

Mr. Ford. Yes; if you remember.

The Witness. I am vague where it was.

• • • •

The Court. What is the date of it, sir?

Mr. Ford. This is the first sheet, your Honor.

The Witness. Isn't that the date there (indicating)?

Mr. Ford. 9/1/42.

The Witness. No. August 1.

756 The Court. What is the date of the application?

Mr. Ford. It says up here "Filed, Received, 9/1/32."

By Mr. Ford:

Q. Now, do you know who was with you when you made it out? A. As I stated before, the Communist Party——

Q. Am I to—— A. (Interposing). Yes, they were the people who called me to the office in the National Committee.

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Q. My question was "who".

The Court. Do you know who it was, sir?

The Witness. No, I don't know the name, a lawyer who was appointed with a person, a plumber.

Mr. Ford. May I submit, he answered the question when he said it was a lawyer who made it out.

My question was "Who made it out".

The Court. Did you say it was a lawyer for the Communist Party? Is that what you said?

The Witness. That is right.

Mr. Ford. I move that "Communist Party" go out.

The Court. You wanted him to identify it, sir.

Mr. Ford. My question was "Who made it out," may it please your Honor.

By Mr. Ford:

Q. Now, the lawyer who made it out, do you know his name? A. No, I can't recall his name.

757 Q. Do you know at what address he had his office, or the name of the building? A. Well, as I recall, I did not go to his office. He came to the state headquarters of the Communist Party.

Q. So, would your answer be you do not know the address of his office, the name of the building where his office was? A. No. I was just told that he was a lawyer to represent the Party.

Q. Now, did he write anything, the lawyer write anything on that sheet?

The Court. If you know.

The Witness. No; I don't see it.

Mr. Ford. By the way, all my questions are directed to "If you know."

The Witness. No; I don't know.

By Mr. Ford:

Q. Now we will take up sheet number 2—well, I am not taking that sheet up because it merely states what the Government did. Obviously he didn't do that.

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Now I am giving you sheet number 3, the passport application, this sheet here (indicating).

Now I will ask you, if you know, where that was
758 made out or filled in A. No. I am vague about the place.

Q. I will ask you if you know who made it out. A. Well, no.

Q. I will ask you whether or not—whether it was or was not, if you know, made out at the same time that you made out number 1. A. That? I don't know.

Q. Now I will take up number 4, the fourth sheet,—

And when I speak of "4", your Honor, I am speaking of the sequence they appear in the exhibits.

The Court. Yes.

By Mr. Ford:

Q. Directing your attention to "oath of allegiance" under which appears your name, on this exhibit (indicating). A. I know about this one (indicating).

Q. Now, where was that made out?

The Court. What does "this one" mean?

Mr. Ford. I am speaking of number 3, your Honor.

The Witness. This was made with an attorney—lawyer—one of these lawyers who they describe as a person that would identify a person going to and from another place.

By Mr. Ford:

Q. Where were you when number 3 was made out? A. I was with this Mr. George Lagree, who was the wit-
759 ness, another party comrade. That was not his real name. He was a plumber. His real name was Welch.

Q. And is he the one that wrote "George Lagree" here? A. Yes, sir.

Q. And at the time that he wrote "George Lagree," you knew that that was not his name, didn't you? A. I didn't.

Q. You thought that was his name? A. I thought that was his real name.

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Q. Now, where was this made out? A. As I stated, in this notary public's office.

Q. In New York City? A. In New York City.

Q. And did you swear to it in front of that notary? A. I was instructed to.

Q. My question is, did you swear to it in front of that notary. A. I did.

Q. Now, was that made out, the one you have just identified, at the same time 1 and 2 were made out? A. I don't believe so.

Q. Now, coming to the fourth sheet, "Affidavit of birth, to be submitted with the application for American passport."

Now, did you write that information in there (indicating)? A. No, sir.

760 Q. Or any of it? A. Another witness, Mr. Simons.

Q. Did you write any of it? A. No, I didn't write any of it.

Q. Is this your handwriting, "William Jackson"? A. That isn't.

Q. Where was that made out? A. I believe in the same notary public's office.

Q. And do you recall whether or not that was made out at the time 1 and 2 were made out? A. I don't recollect, to be exact.

Q Now, at the time you were present on those different occasions at those different places, you knew, did you not, that the matters that were being set forth therein were false and not true? A. I did.

Q. And did you know that it was being given—that false information was being given to the Government of the United States? A. I did.

Q. And directing your attention to this exhibit, "Oath of allegiance," where it says further, "I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic,

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that I will bear true faith and allegiance to the same, and that I take the oath freely without any mental reser-
761 vation or purpose of evasion, so help me God," and then signed it.

Now, at the time you did that, did you mean that? A. I did.

Q. You are sure of that? A. Positive.

Q. That was not false? A. That was not false.

Mr. Ford. At this time, may it please your Honor, I offer in evidence Defendant's Exhibit number 7.

The Court. Any objection, Mr. Kelley?

Mr. Kelley. No. I understood it was already offered.

Mr. Ford. No. I had to identify it first.

The Court. It will be received.

• • • •

762 Mr. Ford. "Application for renewal of passport. Caution: Extension of expressly limited passports must be applied for in conformity with the rules and regulations prescribed by the President and the Secretary of State, pursuant to law, I, the undersigned, hereby apply for a renewal of the period of validity of my passport, the number and date of which appear herein." It gives the renewal series and then it gives passport number 303597, issued on August 8, 1930, at Washington.

763 "I, William Jackson, a native American citizen," —and "never married" is underlined, and "my husband," that is stricken out.

"My legal residence is New York City, New York." "I represent," and that is left blank; "Name of person or organization." Then you see there is a block which has just type on it.

Then it is signed "William Jackson, 17 Rue Street, Paris, France."

"I certify that the person to whom the above passport was issued appeared before me in person and swore to and signed the above application on the 16th day of Au-

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gust, 1932. John F. Stone, American Vice Consul, Berlin, Germany."

The next is headed "Passport application," and I am skipping some typed parts on it.

"United States of America, State of New York, County of New York. I, William Jackson, a native citizen, hereby apply to the Department of State at Washington for a passport. I solemnly swear that I was born at Blackville, South Carolina, Jne 27, 1906; that I was never married; that my father"——And then there is writing scratched out, and over it is written "James Jackson,"—

—"was born at Lake Tuxway, North Carolina, and is now residing at—not living—deceased."

764 "I am domiciled in the United States, my permanent residence being 555 Madison Street, in the City of Brooklyn, State of New York."

"I am about to go abroad temporarily and intend to return to the United States within 12 months with the purpose of residing and performing the duties of citizenship therein. I desire a passport for use in visiting the countries herein named for the following purposes: England, France, traveling with orchestra."

Then the next is headed "Oath of allegiance."

"Further, I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely, without any mental reservation or purpose of evasion, so help me God."

"William Jackson."

And here there is a notary seal, and there is a date that is indistinguishable and there is a name that is indistinguishable, except the last name may appear as "Earl."

Then it gives the description of the applicant as he has read.

Then it gives the "Affidavit of identifying wit-

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765 ness," then the name "George Lagree," 24 West 133rd Street, New York City.

Then a picture, and then a seal.

• • • •

Cross-Examination

By Mr. Kelley:

Q. Mr. Hewitt, I believe you testified that the writing appearing on this exhibit in these words: "Traveling with orchestra; England, France," were not in your handwriting; is that right? A. Yes, sir.

Q. Do you know who did fill that in? A. I believe it was this lawyer of the Communist Party who accompanied me.

Q. How long had you known that lawyer of the Communist Party before you signed these things in his presence? A. Well, he seemed to come from nowhere, and the nature of the Communist Party, who invited

766 me up——

Mr. Ford (interposing). I object to this as not being responsive.

The Court. That is not responsive, Mr. Witness. You say he came from nowhere?

The Witness. Yes, sir.

The Court. Do you mean by that that you just saw him briefly?

The Witness. Yes, sir. I was called up into this national office of the bureau, and he was sitting there, and he was assigned to me to go and gather material on this forthcoming trip.

By Mr. Kelley:

Q. What is the name of the subscribing witness to that passport application? A. I think one is Mr. Lagree, and one is Mr. Plumber.

Q. Now, this exhibit reads in part:

"Affidavit of identifying witness.

"I, the undersigned, solemnly swear that I am a citizen

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of the United States; that I reside at the address written below my signature hereto affixed; that I know the applicant who executed the affidavit hereinbefore set forth to be a citizen of the United States; that the statements made in the applicant's affidavit are true to the best of my knowledge and belief; further, I solemnly swear that I have known the applicant personally for 9 years."

767 Had you known George Lagree personally for nine years. A. Not personally, but I knew of Lagree in the Harlem section of the Communist Party.

Q. How many times had you seen and talked with Lagree previous to the time he signed your application, as approximately as you can tell us? A. Well, on numerous occasions.

Q. Where? A. At the Harlem section of the Communist Party.

Q. The name of the other subscribing witness? A. A Mr. Plumber.

Q. How long had you known him? A. I knew him as a result of his activities in the Plumbers' Union.

The Court. How long?

The Witness. Oh, for a period of about three or four years.

By Mr. Kelley:

Q. Under what circumstances had yon known him?

Mr. Ford. I object as being immaterial.

The Court. How did you meet him, sir?

The Witness. As a result of my communist activity in the Plumbers' Union.

768 By Mr. Kelley:

Q. Why did you sign a false name to that document? A. As I——

Mr. Ford. I object.

The Court. I will sustain the objection.

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795 *Edward S. Greenbaum*

was called as a witness for and on behalf of the defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

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Q. And during the war you were connected with the Office of the Under Secretary of War? A. I was.

796 Q. And what was your rank? A. Brigadier General.

Q. General Greenbaum, I will ask you whether or not you know Carl Marzani. A. I do.

Q. Would you kindly pick him out in this courtroom, if you will? A. Sitting over there (indicating).

Mr. Ford. May the record show he pointed to the defendant, your Honor?

The Court. Yes, sir.

By Mr. Ford:

Q. How long have you known him? A. Since 1943.

Q. Did you know him all during the year 1943? A. Well, the latter part of the year I got to know him.

Q. And 1944? A. Yes, sir.

Q. And since that time; correct? A. Well, I have known him since. I have not seen much of him since.

Q. Was that in the City of Washington in 1943? A. Yes.

797 Q. And did you know other people in the community who knew Mr. Marzani? A. I did.

Q. And amongst those people, what was Mr. Marzani's reputation for truth and veracity?

Mr. Kelley. Just a moment. If the Court please, before the witness answers the question, may I be permitted to determine the extent of his knowledge of the other persons who knew him?

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Mr. Ford. I object to that preliminary question.

The Court. I think it is fair to ask a preliminary question, sir.

Mr. Ford. May I have an exception to your Honor's ruling?

The Court. Yes, sir.

By Mr. Kelley:

Q. Did you work in the same office, General, with the defendant? A. I did not; no.

Q. When you said you had an acquaintance with persons who were acquainted with him, did you refer to his residential community? A. Well, included in the people that I knew who knew—

Q. No. Did you include there an acquaintance on your part with persons who reside in his residential community?

798 Mr. Ford. Wait a minute. I object to him stopping the witness while the witness started to give an answer, in propounding the second question.

He should be permitted to answer first.

The Court. No, sir. Let him answer this question. We will come back, if he wants to explain it.

It will take too much time, Mr. Ford.

By Mr. Kelley:

Q. Did you understand my question, General, as to residence? A. I think so; yes.

Q. As to residence, it is? A. Yes. Included in the people who I knew and who knew him were those who lived in his residential community.

Q. Did you refer to them exclusively or only in part? A. Well, I am referring to them and others.

Q. How many people did you have a common acquaintance with, people living in his social community? A. Social community?

Q. Yes. In his residential community.

Mr. Ford. I object to that word "social."

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The Court. I agree with you, sir. His residential section, where he lived, his home.

By Mr. Kelley:

Q. Where he lived, then. A. Three or four
799 that I know of by name.

Q. Where do they live with respect to him? A. Beg pardon?

Q. Where do they live with respect to his house? A. In terms of distance away, you mean?

Q. In any way you wish to answer. A. In the same general community that he lived, yes.

Q. What do you mean by the general community, now? A. Out around Arlington and Alexandria.

Q. State in a space of miles of how much from his home. A. I just could not say.

Q. They would not be neighbors in the sense of close proximity, as we usually term it? A. I think they were generally neighbors; yes.

Q. Well, let us take them. You say there are three? A. Well, three that I have in mind definitely who knew him quite well and whom I knew well, yes.

Q. The first one of those three, how far did that person live from Mr. Marzani? A. I cannot say, in connection—all I knew of Mr. Marzani's residence was generally in the Arlington section, out that way.

Q. And you haven't any idea how far this first person you have in mind lived from Mr. Marzani? A. Well,
800 I have an idea, yes, probably a couple——

Q. About how far is it? A. I would guess a couple of miles, probably.

Q. How about the second person? The same? A. The three that I have in mind were within that area. There are four. I think of another while you are talking.

Q. Now, as to persons, common acquaintances, yours and Mr. Marzani's—other than those who lived in the vicinity of his residence——

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Q. As to those persons, did they work in your office or his office? By "his" I mean Mr. Marzani's.

801 A. Three of them in my office and one of them in his.

Q. You are acquainted with only one person who worked in Mr. Marzani's office from whom you conclude you are in a position to testify concerning his reputation there? A. Well, you say only one person. One person who I know of as having lived in his immediate vicinity. I knew others who worked with him also.

Q. But do you have any occasion concerning those others, their views, to know their views concerning Mr. Marzani or his reputation? A. Yes.

• • • •

Q. Have you ever heard Mr. Marzani discussed by any of the persons you have in mind as fortifying your idea concerning his reputation?

• • • •

The Witness. You mean recently or at the time I

802 am referring to as having worked with him?

By Mr. Kelley:

Q. At the time you are referring to when you knew him and he was working there. A. Well, I didn't discuss reputations as such. Spoke about the man the same as you or I would about some common acquaintance or friend.

Q. You didn't discuss anything that would bear on his reputation? A. Yes, I guess it would bear on a reputation as far as your knowledge of what the man does and his ability and his general character, and so forth. I did, yes.

Q. You did? A. Yes.

Q. You did discuss his general character with these people? A. General character?

Q. That is correct. A. I wouldn't say specifically I discussed his character, no, about how he was regarded in general, speaking about him then.

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Q. The basis of your discussion was his efficiency and skill? A. Partly that, yes, but not entirely.

Q. Would you say you specifically discussed anything pertaining to his character? A. Well, character is a broad word. I would say yes, all the different things that went to make up a man.

803

Q. From what standpoint? Veracity, did you? A. Well, I never heard it questioned in any way.

• • • •

By Mr. Ford:

Q. Was his loyalty ever questioned? A. It never was, as I ever heard; no.

• • • •

Q. Now, General, among those people, what was Mr. Marzani's reputation for truth and veracity? A. I never heard it questioned.

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Q. What was his reputation for peace and good order and being a law-abiding citizen? A. I never heard that questioned either.

Q. And what was his reputation for loyalty? A. I never heard that questioned.

• • • •

Mr. Ford. Call Mr. Despres.

First, I would like to approach the bench for a minute, your Honor.

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

Mr. Ford. I would now like to present General Greenbaum for the purpose of his testifying as to the nature of the work, the activities and associations that he had with Marzani, Marzani with him, what Marzani did, the nature of the work, and also intend to establish that he worked for 14 and 18 hours a day in connection with this community aspect that was asked about.

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The Court. I will deny that, sir.

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Mr. Ford. May I have an exception?

The Court. Yes.

Mr. Ford. And that having it, it would all have been favorable. That is the proffer.

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Emile Despres

was called as a witness for and on behalf of the defendant

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Direct Examination

By Mr. Ford:

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Q. I wonder if you would tell me your present occupation. A. I am a professor.

Q. Where? A. Williams College, Williamstown, Massachusetts.

Q. Do you know Carl Marzani? A. I do.

806 Q. Would you pick him out? A. He is there, in the tan suit (indicating).

Mr. Ford. May the record show he picked out the defendant?

The Court. Yes.

By Mr. Ford:

Q. How long have you known him? A. Since early in 1942.

Q. And where was it in 1942 that you knew him? A. At the Office of the Coordinator of Information, as the agency was then called.

Q. Were you employed in that office also? A. I was.

Q. And did you know him in '43? A. I did.

Q. Where? A. At the Office of Strategic Services, which was the new name of the same agency.

Q. And in 1944? A. The same.

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Q. During those years that you knew Mr. Marzani, did you know other people in the community who knew him? A. I did. I knew a number of others.

Q. And amongst those people, what was his reputaion for truth and veracity? A. I would say excellently

807 high.

Q. And what was his reputation amongst those people for peace and good order and being a law-abiding citizen? A. Also admirably high.

Q. And what was his reputation amongst those people for loyalty and integrity? A. The same, admirably high.

• • • •

Cross-Examination

By Mr. Kelley:

Q. What was your last answer? A. Admirably high.

Q. For what? A. For loyalty and integrity.

Q. Would your answer be the same if you knew that he had been a member of the Communist Party? A. I'd find it extremely hard to believe unless there was some evidence for it.

Q. Please listen to my question and answer it.

• • • •

808 A. My answer would not be the same if I knew that.

Q. When did you first meet him, what day or month, if you can fix it? A. It was early in 1942, in the late winter or the early spring.

Q. What were the circumstances of your introduction?

• • • •

809 Q. Put it this way: Was it before he was actually hired by the Government? A. It was before he was hired. He was brought to me by another member of the organization. Mr. Marzani was seeking employment.

Q. Who was that member—the other member? A.

Mr. H. C. Barton, Junior, who worked under me at that time.

Q. And it was contemplated that if he came with the Government you would be his superior and so would Mr. Barton; am I correct?

• • • •

A. That is correct, yes.

Q. Have you ever made the statement before Mr. Marzani was accepted for employment by the Government that you, Mr. Despres, become aware that there existed allegations that he was a Communist and that before you hired him you convinced yourself for your peace of mind that his views were not those of a Communist?

Did you ever make that statement?

• • • •

810 The Witness. I—I—I am not certain. I may well have.

By Mr. Kelley:

Q. Now, I want you to tell us what information first came to you upon which you made the statement or may well have made the statement that before you hired him you were aware of allegations that he was a Communist. A. (After hesitation) I can't answer that question with certainty, but I, I believe that such allegations were reported to me by others at OSS who had known Marzani earlier.

.Q And after such information had been reported to you and before he was hired, you invited him to your home for dinner, didn't you? A. I don't recall.

Q. Are you prepared to testify that you never made the statement that you invited him to your home for dinner before he was hired? A. I am not prepared so to testify. I don't recall whether I invited him to dinner—or not (witness smiling).

Q. You have no recollection of having invited him to your home for dinner at any time? A. I don't have any such recollection now.

811 Q. But you may have so stated and it may have occurred; is that right? A. That is correct.

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Redirect Examination

By Mr. Ford:

Q. And would you believe there was anything wrong in your inviting Mr. Marzani to your house for dinner on that occasion?

The Court. The Court would not, sir.

• • • •

The Witness. No, is my answer.

By Mr. Ford:

Q. Now, you were asked by Mr. Kelley to give the circumstances under which you met Mr. Marzani. Now, would you kindly give us all of the circumstances at any time that you met Mr. Marzani, either in '43 or '44, and the places where you met him and how frequently you saw him and met him. A. I met Mr. Marzani the first time when Mr. Barton introduced him to me when we were considering

812 Mr. Marzani for employment, and I, I interviewed Mr. Marzani at that time and had, I think, two or three subsequent talks with him before he was employed.

Thereafter I saw him in connection with office work on a great number of occasions, in 1942 and 1943 and 1944. For approximately one year, I would say, of that period—that is a rough estimate—he was under my supervision but thereafter he was attached to a function which, though no longer under my supervision, was closely allied to my own work.

So I had extensive opportunity to know of his work and to see him at work.

In addition, we have seen each other socially perhaps half a dozen times a year during that period.

Q. And during that time you would see him, about how many hours a day would he work?

Mr. Kelley. Just a moment. Objected to as being beyond the bounds of redirect examination.

The Court. I will sustain that objection.

Mr. Ford. The basis is that he opened the door, your Honor.

May I have an exception to your ruling?

The Court. Yes.

By Mr. Ford:

Q. I will ask you what was the nature of his work.

Mr. Kelley. Same objection.

813 The Court. I will sustain that objection.

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824 *Henry Brodie*

was called as a witness for and on behalf of the defendant

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Direct Examination

By Mr. Ford:

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Q. Where are you employed at the present time, Mr. Brodie? A. State Department.

Q. Directing your attention to the years 1940 and 1941, what were your occupations during those two years? A. I was teaching at New York University, Department of Economics.

Q. In addition to your teaching at New York University, were you also a student there in the graduate school?

A. That is right, yes.

825 Q. Do you know a Carl Marzani? A. Yes.

Q. Would you identify him, if he is in the courtroom, please? A. That is him over there (indicating).

Mr. Ford. May the record show he points to the defendant?

The Court. Yes.

By Mr. Ford:

Q. At the time you were instructing and going to graudate school during '40 and '41, do you know what Mr. Marzani was doing at that time? A. He was doing the same thing.

Q. Did that include going as a student also; correct? A. Yes.

Q. What would the hours of school be for you two? A. No regular hours. Classes in day, and sometimes at night.

Q. What days of the week, as to the day classes? A. They ran from Monday through Friday.

Q. Including Friday? A. Well, I am not sure about the Friday, about economics. Some classes did, but I am not sure about economics.

Q. As to the classes in the evening, what time
826 would they be held? A. From 6 to 10.

Q. How often would you see Mr. Marzani during those times?

The Court. Both '40 and '41, sir?

Mr. Ford. Yes. and by the way, my questions will be to the same years.

By Mr. Ford:

Q. (Continuing) In '40 and '41? A. I used to see him a couple of times a day.

Q. Now, how about in the evening? Did you see him in the evening also? A. Sometimes.

Q. Now, during those years, those times of the day, and those times at nighttime, did you ever see him attend any meetings of the Communist Party? A. Not in the University.

Q. Sir? A. They didn't have any meetings in the University. I only saw him at the University.

Q. My question is, did you aver see him attend any meetings of the Communist Party? A. No.

The Court. He said he only saw him at the University.

Mr. Ford. I understood what he said, your Honor.

827 By Mr. Ford:

Q. Did you ever see him with any Communist literature, books, or pamphlets, of any kind? A. No.

Q. Did he ever suggest to you or did he ever ask you to join the Communist Party?

Mr. Kelley. Just a moment. If the Court please, it is irrelevant and immaterial. If he brought in every man he knew and asked him the same question, what would it prove?

I object to it.

The Court. I assume he did not.

You may answer the question, sir.

Did he or didn't he?

The Witness. No, he never asked me.

By Mr. Ford:

Q. Did you ever hear him suggest or ask anyone else to join the Communist Party? A. No.

Mr. Kelley. Same objection.

The Court. I do not think it would be of any value to us.

Mr. Ford. Does your Honor rule it is not admissible?

The Court. Yes.

Mr. Ford. May I have an exception?

The Court. Yes.

828 By Mr. Ford:

Q. During those times—and I am still speaking about the same time, the years, the day and the night-time—did he ever ask you or anyone else in your presence to contribute to the Communist Party?

Mr. Kelley. Same objection.

The Court. I will let him answer it, sir.

The Witness. No.

The Court. I will let him answer the other question too.

By Mr. Ford:

Q. Did you ever know him under any other name except Carl Marzani? During those times? A. No.

Q. Did you ever hear anyone else during those times call him by any name other than Carl Marzani? A. No.

Q. Did you hear him advocate revolution? A. No.

Q. Did you ever hear him oppose military conscription? A. No.

Q. Did you ever hear him advocate infiltration in the armed services? A. No.

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831 *Cecilia Bowles*

was called as a witness for and on behalf of the defendant

Direct Examination

By Mr. Ford:

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Q. And where are you employed? A. State Department.

Q. And how long have you been employed in the State Department? A. Since October of 1945.

Q. Directing your attention, I will ask you whether or not you know a Carl Marzani. A. I do.

832 Q. I wonder if you would pick him out in the courtroom, if you will? A. Yes, sir. He is right over there (pointing).

Mr. Ford. May it show, the record, that she picks out the defendant?

The Court. Yes.

By Mr. Ford:

Q. Did you know at any time when you were in the State Department, Mr. Carl Marzani? A. Yes; as an employee.

Q. Did he work in the same office you worked in? A. Yes.

Q. Who else worked there? Was there a Mr. Barton there too? A. That is right.

Q. What was the position you had there when Mr. Marzani and Mr. Barton worked there? A. Clerk-stenographer.

Q. During the time that you knew Mr. Marzani in the State Department, did you know other people in the community who knew Mr. Marzani? A. Yes, I did.

Q. Amongst those people what was Mr. Marzani's reputation for truth and veracity? A. It was fine.

833 Q. And what was his reputation amongst those people for peace and good order and being a law-biding citizen? A. It was fine.

Q. What was his reputation amongst those people for loyalty and integrity? A. It was fine.

* * * *

834 *Robert Daniel Francis*

was called as a witness for and on behalf of the defendant.

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Direct Examination

By Mr. Ford:

* * * *

835 Q. Mr. Francis, where are you employed now? A. In the Department of State.

Q. Do you know a Carl Marzani? A. I do.

Q. I wonder if you would pick him out in the court-

room, please. A. That is Mr. Marzani seated over there (indicating).

Mr. Ford. May the record show that the defendant was chosen?

The Court. Yes.

By Mr. Ford:

Q. When was the first time you met Mr. Marzani? A. October, 1942.

Q. And where? A. Office of Strategic Services.

Q. How long did you know him from that time on in the Office of Strategic Services?

Let me withdraw that.

What other places, other than Washington, D. C., did you know him? A. We were overseas together for a period of time in the armed forces.

Is that what you mean?

Q. That is the place. Whereabouts were you? A. London and some points in Italy. Rome, Caserta.

836 Q. When you were living in Italy, is it a fact that Mr. Marzani lived in the same tent with you? A. That is right.

Q. And that was when you were in the armed services; correct? A. That is right.

Q. Now, when you were in Europe, and particularly in Italy, and knew Mr. Marzani, what time was that? Can you locate that time? A. Between the dates April 23, 1945, and June 22, 1945.

Q. And during that time when he lived there, did you know other people in the community who knew him? A. I beg your pardon. Do you mean——

Q. Did you know other people in the community in Italy, when you were living in Italy—did you know other people in Italy who knew him at the time? A. Why, yes.

Q. And amongst those people what was Mr. Marzani's reputation for truth and veracity? A. Well, I have no indication that there was anything against that. I mean that is the best way I can answer it.

Q. And what was his reputation for peace and good order and being a law-abiding citizen? A. Again, there was everything in his favor in that respect.

837 Q. And what was his reputation for loyalty and integrity? A. The same applies to that.

Q. Now, coming to the time when you knew him in Washington in the Office of Strategic Services, and then did you know him after the Office of Strategic Services became part of the State Department also? A. Yes.

Q. Now, during both of those times, did you know other people in the community here in this country that knew Mr. Marzani? A. I did.

Q. And amongst those people, what was his reputation for truth and veracity? A. I should say it was the same; that it was good.

And what was his reputation amongst those people for peace and good order, and as a law-abiding citizen? A. I have no indication that it was anything but good.

Q. What was his reputation for loyalty? A. The same applies.

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839 *James Stephen Wright*

was called as a witness for and on behalf of the defendant.

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Direct Examination

By Mr. Ford:

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Q. You are employed in the State Department now? A. Yes.

Q. Do you know a Carl Marzani? A. Yes, I do.

Q. Could you pick him out? A. Yes, I can.

Q. Would you? A. Yes. There he is (indicating).

Mr. Ford. May the record show he picked out the defendant, Carl Marzani?

The Court. Yes.

By Mr. Ford:

Q. Now, how long have you known him? A.
840 Since 1945.

Q. And at what place did you know him then? A. OSS, Washington.

Q. And then subsequent to the time at the OSS, did you know him in the State Department also, when the OSS went to the State Department? A. Yes, I did.

Q. Now, do you know other people in the community that knew him during that time? A. Yes, I do.

Q. And amongst those people what was Mr. Marzani's reputation for truth and veracity? A. He was very truthful.

Q. What was his reputation amongst those people for peace and good order and being a law-abiding citizen? A. Very loyal.

Q. And what was his reputation amongst those people for loyalty and integrity? A. He was very loyal.

Q. What is the nature of the work you do at the State Department? A. Photography.

Q. And is that in the photographic branch of the State Department? A. State Department.

841 Q. And does that cover all types of photographic work? A. Yes, it does.

• • • •

893 *Carl Aldo Marzani,*

the defendant, was called as a witness in his own behalf

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Direct Examination

By Mr. Ford:

Q. State your full name, sir. A. Carl Aldo Marzani.

Q. What is your address, Mr. Marzani? A. 508 North Fillmore Street, Arlington, Virginia.

Q. And you live there at the present time? A. Yes, sir.

Q. With whom? A. I live there with my wife, my child of three, and my mother.

894 Q. Where were you born? A. I was born in Rome, Italy.

Q. Do you recall the year? A. Yes, sir, 1912.

Q. Did there come a time when you left Italy? A. Yes, sir.

Q. If so, when? A. It was in the late summer of 1924.

Q. And did you come to America at that time? A. Yes, sir. Arrived here Labor Day, 1924.

Q. What schooling did you have in Italy during the years you lived there? A. Well, I started off with kindergarden, primary schools, and secondary schools. I might explain that secondary schools are a little more pushed together than they are here in America, so that you only have five years of primary and three years of secondary schools, making a total of eight rather than twelve.

Q. When you came to America, did you come with your parents? A. I came with my mother and my sister.

Q. And was your father living at that time? A. Yes, sir.

Q. And where was your father at that time? A. My father was living in a small town by the name of

895 Peckville, which is in Pennsylvania.

Q. When had your father come to America in relation to when you came? A. He had come many months before, about eleven, I think, eleven months previously.

Q. What were the circumstances under which your father came to America? A. My father was in the Govern-

ment service in Italy, and in 1922 Mussolini came to power with a great deal of violence and bloodshed which my father didn't like, and in the process——

Mr. Kelley (interposing). If the Court please, I object to what his father liked or didn't like. It has not anything to do with what this man did.

The Court. I will sustain your objection.

Mr. Ford. I expect to show that that had a certain effect on this gentleman, and will connect it up with certain activities here in America.

The Court. I will not hear that testimony, sir.

Mr. Ford. May I have an exception?

The Court. Yes, sir.

By Mr. Ford:

Q. Then, when you went to Peckville, did you take up your residence with your father and the rest of your family? A. Yes, sir, I did.

896 Q. And then how long did you live in Peckville? A. A couple of years.

Q. And during those years, what were your activities in that city? A. Well, I was very busy learning English, for one thing, and I went to school. I started school in the first grade.

Q. That would be grammar school, would it, or primary school? A. Yes, primary school, first grade. And, as I say, to learn English, and I moved up. I did first and second and third grade in one year, and fourth and fifth and part of sixth grade the next year, and that kept me pretty busy.

Q. Then you graduated from primary school in Peckville, Pennsylvania, is that correct? A. That is correct.

Q. And while you were going to primary school, did you engage—and if you did, tell us what type of activity—in work? A. Well, I would help my mother around the house. We had a pretty tough time. My mother was sewing dresses. I tried to learn baseball. I didn't do too well, but that is, you know, just a kid growing up.

Q. Then did there come a time when you went to Scranton High School? A. I went to Junior High
897 School, sir, in North Scranton.

Q. Then after that, did you go to high school in Scranton? A. Yes, sir, I did.

Q. Did you graduate from the Scranton High School? A. Yes, I did.

Q. While you were going to Scranton High School, what activities or work did you engage in? A. I was working after hours from 4 o'clock in the afternoon until 12 o'clock at night in a gasoline station, in a greasing station, and some nights, once a week, I would work the whole night through, and then I would be doing my home work and going to school.

Q. Then did there come a time when you graduated from Scranton High School, and I wonder if you would locate the year. A. Yes. I graduated from Scranton High School in 1931.

Q. Upon your graduation from high school in 1931, what did you do then? Did you go to school immediately or did you go to work? A. No, sir. Well, I had had sort of my share of work, I felt, and I have always wanted to see America, because I had never moved from Pennsylvania, so I took the opportunity of that summer to hitch-hike all over the United States. I went 9,000 miles from
898 coast to coast, and from the Rockies to Texas, all up and down the United States, working my way around. I spent a dollar and a half for that whole summer.

Q. Then, after your graduation from Scranton High, did you move to any other city? A. Yes, I moved to Williamstown, Massachusetts, where I went to college.

Q. And was it on a scholarship that you had been awarded in Scranton High School that you went to Williams? A. The award of the scholarship was made by Williams College.

Q. Yes, and did you earn that award and get it? A. Yes, sir, scholastic award.

Q. And then did you go to Williams College in Massachusetts? A. I went to Williams for four years, from 1931 until 1935.

Q. And during that time, while you were at Williams, what did you study or what was the course of study at Williams College in Massachusetts? A. My major was literature, American literature, and my minor, or subsidiary course, was science. I studied physics, quantum theory, anatomic, Einsteinian theory, and so on, I was very interested in science.

Q. Then when was it that you graduated from
899 Williams? A. In 1935.

Q. And while you were at Williams were there any other activities that you engaged in there other than the study of these subjects you have enumerated? A. Yes, sir. For the first three years I worked, waited on tables, and did odd jobs like collecting laundry for the students and things like that, to earn my way through while I was going. In the fourth year, I was elected president of a large club, eating club.

Q. What was the name of that? A. Which was called the Garfield Club, which carried with the presidency—that is the place I had been waiting on table, incidentally—which carried with it the responsibility of administering a rather large budget, $10,000 or so, a month, and in exchange I was paid my food for doing that..

Besides working and studying, I did some smaller activities. I was editor of the literary magazine for three years; I directed a couple of small plays; I was one of the executives—one of the four members of the executive members of the campus, had to pay some attention to student government. I was also a member of Phi Beta Kappa during my junior year and my senior year, and I was a member of the society called the Gargoyle Society, which consisted of 10 members of the university, of the college, chosen every year on the basis of their contribution to the school.

900 Q. What was the nature of that society? What was that society's activities? A. The society's activities was the promotion of the welfare of Williams College, the maintenance of students' standards, the maintenance of conduct—well, Williams, you know, has a good reputation, and it was the business of Gargoyle to see that it maintained that reputation.

Q. Then, when you graduated from Williams College, what did you do then? Did you go to school immediately or did you engage in some work? A. No, sir. I went to New York and went to work.

Q. What year was that? A. This was 1936.

Q. When you went to New York for work, did you go by yourself? A. Yes, sir.

Q. And where did you go to live when you arrived in New York in that year? A. I lived on, I believe, 22nd Street.

Q. Is there any other designation for that particular area where you went to live? A. Oh, yes, sir; that is a pretty tough section. It is sometimes known as "Hell's Kitchen."

Q. Is that on the West or the East Side of New York? A. It is on the West Side, extreme West Side, towards the river.

901 And when you went there, did you take up residence by yourself? A. I did for a few weeks, and then one of my roommates—I had a couple in college—came down and lived with me for a while.

Q. And then at that time where did you go to work in New York? A. I worked with a publishing firm for several months in a specific assignment.

Q. What is the name of the publishing firm? A. Simon and Schuster.

Q. How long did you stay in their employment? A. As I say, it was a specific job they hired me to do, and it lasted about, I think, three or four months.

Q. What was that job that you did for that publishing concern? A. It was to go through a big back-log they had established of manuscripts and novels in foreign languages and in English, that is, the British editions thereof, that is, French, Italian, Spanish, and publishing firms receive this stuff and somebody has got to go through it.

Q. What other activities or business at that time did you engage in in New York, or do? A. I did try to write a little bit. I am not too successful.

902 Q. About what subjects, or what was the writing about? A. Well, I wrote a play about mining towns, coal mining towns, based on my experience——

Q. By the way, I will ask you, is Peckville or Scranton a coal mining town? A. Peckville is, and Scranton—it is one of the largest areas in the United States——

Q. In addition to writing about miners, what other writings or anything did you engage in at that time in New York? A. That is all, sir.

Q. And how long did you stay in New York on that occasion? A. I left New York in either August or September.

Q. Of what year? A. Of 1936.

Q. And what was the occasion of your leaving? A. I had received a fellowship to Oxford University.

Q. From where? A. From Williams College. It is a fellowship known as the Moody Fellowship, established to be given once every three years at the discretion of the President and the faculty to one of the members of the college, whom, in their opinion, would benefit by it.

903 Q. And did you accept that fellowship? A. Yes, I did.

Q. And where did you go then from New York after you accepted that fellowship? A. I went to London.

Q. And did you go by yourself? A. Yes.

Q. Or with anyone else? A. I was alone.

Q. Did you at that time apply for a passport to the State Department? A. Yes, I did.

Q. And what name did you apply for that passport in? A. The only name I ever used—Carl Aldo Marzani.

Q. Then when you went to London, did you report in Oxford? A. Yes, I did.

Q. And what were the subjects you took up or studied at Oxford in London? A. The subjects I took up were a combination, which is sort of a specialty of Oxford. It is what Oxford is very famous for, and they have a thing called Modern Grace. It is a title they have, and it comprises three related subjects, philosophy, history, and economics.

904 Q. And how long did you study at Oxford, those subjects? A. Two years.

Q. And what activities did you engage in while you were at Oxford? A. Well, for one thing, I got married.

Q. How long had you been at Oxford when you got married? A. Several months.

Q. And as to your marriage, your wife came from the United States and met you over there? A. Yes, she came from the United States. We met here and I wrote her and said "Let's do it, and she said "O. K."

Q. After you wrote her "Let's get married," did she come to London? A. She came to Southampton. I met her there.

Q. And you were subsequently married? A. Yes, we were married in the Oxford Registry.

Q. And that is at the University? A. Yes.

Q. Now, what is your wife's name? A. Edith.

Q. What was her maiden name? A. Eisner.

905 Q. And what activities did you engage in while you were at Oxford? A. I went to Spain for a couple of months.

* * * *

Q. Tell us when you went there where you went and what you did, your activities? A. Well, I went because I had heard that Mussolini was sending Italians down there

to fight against the Spanish people, and I wanted to see what was going on.

A. And did you go down there? A. I went alone, using my own money, my own passport, my own name. I arrived in Barcelona, stayed there a couple of days trying to get visas from the Spanish Government—who were very hard about it—to go to the front lines.

I finally succeeded in getting a permit to go about a hundred miles ahead, and in the process of going there, I got picked up one day by a truck in a little village. I might mention, for example, that I had stopped in this village because it had a large textile plant. I wanted to see what was going on. I found the Spanish people
906 working and running their machines, and a man was coming through from Barcelona—troops were going to the front all the time—and a man picked me up, who was an anarchist, and we got very friendly, and I spoke Spanish; I had been in Mexico previously, and I had studied Spanish at school, and he said, "Come on up to my headquarters."

I think he was kind of pleased to have an American captured. So I said, "Surely." And he went to his headquarters, which was the headquarters of the largest anarchist column in all of Spain. It was called the Derucci Column, and it had about 6,000 members. This was the headquarters, and I was the only American there, and, as far as I know, the only person that they had who was not a Spaniard, at any time. And I spent a good deal of time with them, discussing and talking with them——

Mr. Kelley (interposing). Just a moment, if the Court please, I do not like to unduly limit this——

By Mr. Ford:

Q. What about——

Mr. Kelley (interposing). Permit me to finish.

I do not wish to unduly limit the proper accounting of this man's background, but I do feel we have gone afield.

The Court. I agree with you sir.

Mr. Ford. I had attempted to stop at that time.

907 The Court. I will state to you, Mr. Ford, that we are interested in the issues of this case, and not the Franco War in Spain, sir.

Mr. Ford. That is what I think we are covering now, your Honor. That is why I am offering it.

The Court. Well, sir, I will not continue in this line.

Mr. Ford. I had told him I would stop.

By Mr. Ford:

Q. Now, just tell me the length of time you spent there. A. About two months.

Q. At the end of that time, did you return to Oxford? A. Yes, I did.

Q. And what were your activities at Oxford? A. I was one of the directors of the Oxford Little Theater Society and directed several plays.

I did a bit of writing for the local magazine. I also began to earn a little money in American magazines by writing, and English magazines.

Q. Did there come a time when you left Oxford, and if so, when was it, and where did you go or what did you do? What were your activities? A. About 1938, I guess it would be, in the spring of 1938, having graduated from Oxford and obtained a degree with honors, my wife and I decided to come back to America. That is where we

908 belonged.

We had saved $500 out of this writing I had mentioned, and my wife said, and I said, "We would never have another chance; let's go around the world." And we did.

Q. Did you then leave and go to any countries in Europe, and if you did, name the countries. A. Yes, sir. We left England, hitch-hiked to the coast, took a boat to Denmark, the west coast of Denmark. We hitch-hiked all over——

The Court. Mr. Ford, we don't want to know all of the methods of transportation.

By Mr. Ford:

Q. Did you go to Denmark? A. Denmark, Norway, Sweden, Holland, Belgium, Germany, Hungary, Roumania, Turkey, Syria, Irac——

Q. Did you go to Japan? A. Yes. I went to India——

Q. Did you go to China? A. Yes, sir.

Q. Did you go to Russia? A. No, sir.

Q. Have you ever been to Russia? A. No, sir.

Q. Now, after you had made this trip with your wife, and when that was finished, did you come back home? A. Yes, sir.

909 Q. And what time was it, and where did you land? A. We landed in San Francisco. It must have been May or June, 1939, and we, without money, came across the country and came to the East Coast here.

Q. And when you came to the East Coast from 'Frisco, where did you then take up your residence? A. We lived for a couple of months with my wife's parents—several months—and then came to New York City, which was my legal residence.

Q. And where did you go in New York City? Did you and your wife take up residence in New York City? A. We took up residence on the East Side.

Q. And at what address? A. 643, I believe, East 6th Street.

Q. And would you locate the time when you took that residence up and returned to New York? A. Yes. It was in the fall of '39.

Q. And did you get employment then, or what did you do after you had established your residence down on the East Side? A. I tried to get work. It was very hard. I did, and my wife did. We had left maybe $50 or $60, and used all that up. There was no soap—no jobs. And finally we applied for relief.

I was on relief for a matter of two or three weeks, and from there went on to WPA.

910 Q. And what kind of work did you do under WPA? A. I did economic research on WPA.

Q. And that was a Government organization, that WPA was it? A. Yes, sir.

Q. Then, what else did you do? Did there come a time in New York when you went to school? A. Yes, from that WPA job I finally succeeded in obtaining a position as senior assistant in economics at New York University, which carried with it certain duties and certain privileges.

Q. What were the duties? A. The duties were that I had a certain amount of teaching assigned to me—that is, regular teaching schedule—I had to be at the disposal of the professor, the four professors, for handling of their reports, correcting papers, and so on. I had to be on call, to be available in case one of the professors, for any reason, could not take his class. Then it was my duty to conduct that class.

I also had to do such things as proctoring and whatever administrative work was suggested; correcting papers, examination papers, drawing up examination lists, et cetera.

Q. And how long did you hold that job and do that work at New York University, and what years did it cover?

A. In 1940 I was senior assistant. The next year
911 I was promoted to instructor.

Q. You mean the next year, '41? A. '41.

Q. And were you there during those years, attending there? A. Yes, I was.

Q. Now, in addition to being an instructor, did you, during those years, enroll in New York University as a graduate student? A. Yes, sir. Part of the privileges of the position was the privilege of enrolling as a graduate student in seminars, looking towards the completion of higher degrees.

Q. Now, during those two years, what days of the week would you attend New York University as an instructor, teacher? A. Well, every day, Monday to Friday.

Q. And aprpoximately what hours of the day did they cover? A. Well, I can't tell you exactly, because we had special teaching schedules—specific teaching schedules—

let us suppose that on Monday I had a class to teach from say 9 to 10 or 10 to 11. I would be there, and then be, for several hours during the day, usually the whole day, until 4 or 5 o'clock, or so.

912 Q. And what were the hours that you would attend New York University during those two years when you were doing student work and studying as a student? A. During the evening, mostly. I don't recall exactly every detail, but some classes went from 5 to 7 or 5 to 6:45. Some went from 6 to 7:45. Some went from 8 to 10. Also, some seminars carried the whole evening through. In other words, you would go to the house with the professor, where there would be a group of five or six students, and you would start at 6 o'clock. As a matter of fact, we usually had dinner together, and then go on to the professor's apartment and go on until all hours, 10, 11, 12.

Q. What were the subjects that you taught at New York University during those two years? A. I taught economics.

Q. What were the studies you studied as a student during those two years at New York U.? A. I studied economics.

Q. Then, were you, during those two years at New York U., living at the same address with your wife? A. Yes, I was.

Q. And then did there come a time when you left New York? A. Yes, sir; right after Pearl Harbor.

Q. In addition to your teaching at New York U., and studying during those two years, what other activ-

913 ities did you engage in in New York City during those two years? A. Well, I continued writing. I did quite a bit of writing.

Q. Well, tell us some of the things you wrote, what topics or subjects you wrote. A. Well, I wrote the story of my trip around the world. I wrote a play on Italians in Pennsylvania. I wrote several articles or anecdotes,

trying for the New Yorker, and magazines like that. I also did a tremendous amount of work on a novel which just was, you know, was very big, and I am still at it.

Q. Did you engage, during that time, in any civic work in New York City on the East Side? A. Yes, I did.

Q. What was it? A. The outstanding work that recalls most clearly to my memory was being the secretary of the East Side Conference to Defend America, which later became the East Side Defense Council, and which later became the Office of Civilian Defense, to which I was unanimously elected by the representatives of the com-
community of the East Side.

Q. When was it that you became active in that civic organization, approximately? A. It was in 1941,
914 summer or fall, somewhere in there.

Q. Under what circumstances did you become engaged in that civic activity? A. Well, to understand that, you have got to understand the East Side. It is one of the most densely populated areas in New York City, with probably—well, very few nationalities are missing from it, many races and many creeds, but two of the largest groups are the Jewish group and the Italian group, and, as you remember at that time, there was a good deal of tension in the air. There were many Americans who did not believe we should go to war, and there were other Americans who just as honestly believed that we should. And, unfortunately, that was reflected in some of these national groups. The Jewish people could not possibly forget what Hitler had done to the Jewish people. They honestly believed that Hitler was a traitor, a threat to America. The Italian people, right or otherwise, misguided some, perhaps, thought that America should not go and fight Mussolini. And the result was that a tremendous tension was building up, very serious. It cannot be overemphasized, the possibilities of riots, public disorders and a real mess.

And under those circumstances, a group of citizens were, with Meyer Goldberg as the chairman—

Q. Who was Meyer Goldberg at the time? A. I believe he was Councilman of the City of New York
915 and had just been Assemblyman of the State of New York. I am not quite sure. I know he was both at one time or another. He was one of the leading citizens, if not the leading citizen on the East Side.

Q. Then what was done? A. They asked me to become executive secretary, particularly because I was an Italian, spoke Italian, and I believed that Hitler was a menace to the United States. And it was a very large organization. It represented practically everyone on the East Side, and it conducted activities such as, for example, we had a parade of nationalities at which prominent speakers came. Newbold Morris, who was the head of the City Council of New York City. He was Mayor LaGuardia's deputy; a man who was the head of British-American relief, or British Relief Society—I forget the exact title—and several speakers of that caliber.

We also ran meetings. We set up stations in stores and settlement houses, of which there are many on the East Side, like Henry Street Settlement, for example, for the collection of funds, clothing, packages for the people who were fighting; the British people——

The Court. Do we have to go into all this detail, Mr. Ford?

Mr. Ford. Yes, your Honor, because I believe it relates to the activities in New York City in which he engaged, and the reason why I am asking about the nature
916 of activities is because I think they contradict the activities he is charged with conducting during that period of time at that place.

The Court. He is not stating to the specific charges at all here.

Mr. Ford. And I expect to connect it up with the Government's exhibits relating to that organization and so-

ciety, and the activities that those pamphlets state were conducted, your Honor.

The Court. Well, you are making a speech now, Mr. Ford.

Mr. Ford. Excuse me. Well, your Honor, that is my purpose.

The Court. I will say to you, sir, we are not going to have all the details of this organization.

By Mr. Ford:

Q. And how long did you act for that organization and that civic society in New York City? A. Until I was elected executive secretary of the Office of Civilian Defense on the East Side, which was in February of 1942.

Q. Then did there come a time when you came to Washington? A. Yes, sir.

Q. And I wonder if you would locate that time, if you will? Did you come from New York? A. It was
917 in late February, 1942.

Q. And was that to make application for a job in the Government? A. Yes, it was.

Q. And then, as a result of that, did you get a position in the Government? A. Yes, I did.

Q. And what date was it that the Government appointed you to that position? A. I am not positive. I think it was the 4th, 5th, 6th, somewhere in the early part of March, 1942.

Q. And what was the position you took? A. Senior Economic Editor.

Q. With what organization of the Government or what part of the Government? A. It was the Coordinator of Information, under Mr. William Donovan.

Q. How long did you stay in that job? A. I forget. It was several months, three or four months, and then I—still in the same place—I became—I think I started as a Junior Economic Editor and became a Senior Economic Editor. Then I was in that for several months, and then I was chief of my section, and then stayed in that for some

more time and became Deputy Chief of the branch
918 of the larger division.

Mr. Ford. Now, without traversing your Honor's direction, I am about to ask him—and don't answer this—what his work and his activities were in that time when he was in that office in the Government.

The Court. You mean his professional functions there, sir?

Mr. Ford. Yes, sir, the work he did and his activities.

The Court. All right.

By Mr. Ford:

Q. Now, when you were in that branch of the Government, Coordinator of Information, what was the nature of your work and duties? A. It was very varied.

The Court. Let me say this to you, Mr. Ford, so that you can talk to your witness.

We want everything that is material to this case, but we don't want all the details.

Mr. Ford. No, sir.

By Mr. Ford:

Q. In a general way, tell me then the nature of your duties when you were in that office of Coordinator of Information? A. Intelligence work, such as, for example, picking the targets for the Doolittle raid on Tokyo.

919 Q. Did you do that? A. Yes, I did.

Q. Generally, what was some of the other work in addition to intelligence work for the Government—what other type of work did you do? A. What are called capability studies, that is, an analysis of what Germany could do in Tunisia, for example; our troops were in Tunisia, and the Germans were putting troops on the other side, and one of the big basic problems is how much manpower can the Germans put on the front line in a given time.

Q. And did you work on those problems for your Government? A. Yes, I did.

Q. And then did there come a time when that organization changed either its title or the nature of its work—

the Coordinator of Information? Did that office take another name? A. Yes. It became the Office of Strategic Services.

Q. And did you go, then, and stay in the Office of Strategic Services? A. Yes, I did, in a new division which we had organized.

Q. And was that organized and headed by General Donovan? A. Yes, sir, it was.

920 Q. And how long did you say in that particular named branch—Office of Strategic Services? A. I was there until I was inducted into the Army in 1943, September, I believe, or late August.

Q. In general, what was the nature of your work while you were working in the Office of Strategic Services until the time you were inducted into the United States Army? A. Well, we were trying out a new technique of taking data which was important to the General Staff and presenting it in a very quickly assembled form, so you could see it—charts, movies, slides, exhibits.

Q. Would you give me the names of some of the Army officers and their titles, that you worked with during that period? A. Yes, sir. The first job I did was for General Marshall.

Mr. Kelley. I object. This is immaterial and irrelevant to the issues we are trying in this case.

The Court. I don't think it makes any difference.

Mr. Ford. May I have an exception, your Honor?

The Court. Yes, sir.

By Mr. Ford:

Q. Then when you come to the time when you were inducted into the Army, what occurred when you
921 were inducted? A. I was shipped out to a camp —Camp Lee.

Q. Down in Virginia? A. Yes, sir, and began to get my training, and then I was ordered back to the Office of Strategic Services.

Q. And you still remained in the Army, with the rank of private, at that time; is that correct? A. That is correct.

Q. Then, as soon as you were ordered back to take that job, you still remained in the Army as a private; right? A. That is correct.

Q. And what was the nature of the work you did then? A. Well, I went back as Deputy Chief for the division in civilian clothes.

Q. And how long did you continue working in that job as a private? A. I think it was about eight months, and then I got promoted to Master Sergeant.

Q. And then did you still stay here doing that work in Washington, D. C.? A. No. I went overseas.

Q. When? A. I think it was about December—November or December of 1944. I don't recall exactly.

Q. And were you still in the Army? A. Yes,
922 I was.

Q. And then did you do work in the Army overseas? A. Well, I was in the Army, assigned to the Office of Strategic Services.

The Court. Did you go for the Office of Strategic Services?

The Witness. I went for the Office of Strategic Services.

By Mr. Ford:

Q. How long were you over there in that work? A. I was in London for, I believe, four months, three or four months. I was in Germany, and I was in France for a period of weeks, and then I was ordered—I was requested, rather, I should say—by the Theater Commander of the Mediterranean Theater in Caserta to go to Italy, which I did. I arrived in Italy somewhere in the spring of '45, perhaps in February, I don't recall, but some time in the early time, and I was in Italy for several months until I finished the job.

Q. What was the nature of your work during that period that you have just enumerated? A. Redeploy-

ment of the American troops of the Japanese Theater, and the release of these troops to the Japanese Theater.

923 Then did there come a time when you came back to the United States? A. Yes, sir. I flew back in June, I believe, or July.

Q. You were still in the Army? A. Yes, I was.

Q. Master Sergeant? A. That is correct.

Q. And then when you came back, where did you come to? A. I came to Washington.

Q. And did you resume your work here in Washington for the Office of Strategic Services? A. Yes, I did.

Q. Then did there come a time when you received a discharge from the Army?- A. Yes, sir. I received an honorable discharge in September, 1945.

Q. And at the time you received that honorable discharge you were in the Office of Strategic Services? A. That is correct.

Q. Then did there come a time when the Office—— A. Excuse me, I am not quite sure, but at this time we were being transferred to the State Department, so it is my recollection that the papers were initiated while I was

924 still in the Office of Strategic Services, but actually the date I was out of the Army, we had become part of the State Department.

Q. The Office of Strategic Services, then, by Government order, became part of the State Department? A. That is correct.

Q. And you went right along with the Department? A. That is correct.

Q. Then you took up work in the State Department as a civilian employee; correct? A. That is correct.

Q. And in what branch did you take up that work? A. I was Deputy Chief of the Presentation Division.

Q. What was the nature of your work there? A. It was the preparation, again, of reports for high officials in the State Department in a form which was quicker and more concise and clearer, and so on.

Q. And then did there come a time when you ceased to be employed by the State Department? A. Yes, sir.

Q. When was that? A. I resigned on November 15, 1945. I am sorry, 1946.

Q. And was your resignation accepted on November 15, 1946? A. Yes, sir.

925 Q. And then where did you go to work on that day? A. In the city of Washington, in my own private outfit, making films for the labor movement.

Q. And are you still engaged in that business here in the District of Columbia? A. Yes, sir, I am.

Q. Did you know while you were in the State Department a man by the name of Panuch? A. Yes, sir; very well.

Q. What was your association with Mr. Panuch while you were in the State Department? A. It was a double one, sir. He was my superior in the channels; that is to say, he was, you know, third or fourth up. Also, we had quite a good personal relationship.

Q. Now, directing your attention to on or about June 1946, did you have an interview with Mr. Panuch? A. Yes, I did.

Q. I wish you would kindly tell us in substance what took place in that interview between Mr. Panuch and yourself; what he said or what you said, in substance, please. A. Well, I had been asked to resign from the State Department, and I went in to see Mr. Panuch about that request.

The Court. Excuse me; I didn't hear you, sir. Did you say you had been asked?

The Witness. I had been asked to resign; yes.

926 I went in to discuss with him what was the problem. It was a very lengthy conversation, over two hours, in which Mr. Panuch did a lot of the talking.

By Mr. Ford:

Q. I wish you would condense it, if you can, and give

to us in substance what that conversation was. A. Well, I remember walking in and saying, "Hello, Joe," and he said, "Hello," or something like that.

And I said, "Well, you know, I have come over to tell you that I have been asked to resign. You probably know that," and I said, "I just want to tell you that I have no intention of resigning. If I have done something wrong, fire me, but I have not."

I said, in substance, that my beliefs had always been very well known in the OSS, in the State Department. I never made any secret of my beliefs, and as to Fascists and pro-labor unions, and I had certain disagreements with the way the State Department was pursuing its foreign policy, and I mentioned them.

I said, "You know, Joe, I am not a member of the Communist Party."

I said that to him; he never asked me. "I am not a member of the Communist Party," I said, "nor am I a spy." "I don't sell secrets of my country. I don't even make leaks," I told him, and I told him specifically, "I don't even make leaks like certain State Department officials do to Drew Pearson, or like certain people in the Department of Justice, like Mr. Hoover, to Walter Winchell."

927

The Court. We are not concerned with that.

Mr. Ford: We can leave that out.

By Mr. Ford:

Q. That was part of the conversation, and the reason I asked it specifically, of course, your Honor asked me about my basis for questions when I was questioning Mr. Panuch.

I want to show I had a basis for it.

The Court. This witness not——

Mr. Ford (interposing). I am shutting him down right now.

The Court. Yes, sir; and I will ask you to keep that out from now on.

Mr. Ford. It is only that it was brought out in the conversation of Mr. Panuch, if your Honor will remember, when I stood up and read some questions, and your Honor asked me the basis of it.

That was all.

Mr. Kelley. Just a moment.

Mr. Ford. I am changing that subject right now.

Mr. Kelley. If your Honor please, I move that that matter be stricken and that the jury be instructed concerning it, that there is no basis for such a report.

928 Mr. Ford. I have no objection to that.

The Court. Such damage as any that follows from that.

It will be stricken.

By Mr. Ford:

Q. Then what other conversation did you have with Mr. Panuch about either Communism or your job? A. Well,——

Q. What did he say to you or you to him, in substance? A. Having said to him that I was not a member of the Communist Party and that I was not a man to treat confidential matter lightly, we went on to quite a lengthy discussion about American policies, American foreign policies, our relationship with Russia, which he participated in to a very large extent, and seemed to have some agreements with me, and seemed to have some disagreements.

We talked about that, as I say, for quite some time, and told him somewhere in the conversation—Oh, I told him that I had no particular desire to stay in the State Department, given this kind of a set-up, this kind of talk, but that on the other hand, I was not going to resign under fire.

My reputation was important to me, and that it was part of my future and my career and my well-being.

And somewhere along there he said to me, "Carl, what about this stuff about Tony Whales?" That is just the

way he put it. And I said, "Well, Joe, you know that; that has been done all over again."

929 I said, "It was all over in the Civil Service Hearing. I answered it. I was found suitable for Government. I sure thought that was dead and buried for once."

And I told him that I had a book which I had presented, of evidence, to the Civil Service Commission to get. I said, "I don't know if you have seen this, Joe, but here it is. Will you look at it?"

He said, "Sure." He also made certain statements about Mr. Russell, which I don't want to repeat.

Q. No, leave them out.

Just tell us now, you showed him some evidence that was adduced at the hearing of the Civil Service Commission? A. He also made some statements about his own ability as a lawyer in New York—which I don't want to repeat.

Q. Don't give us the details, just the reference to them. A. He also made a long dissertation, I would say, for half an hour perhaps, on theories he had about the world and world history. They were compounded of a man named——

Q. Just tell us, he did that as a fact? A. He did that.

Q. Now, I will ask you whether or not there came a time in August of 1946 when Mr. Panuch had an interview with you? A. Yes, there was. We saw each

930 other fairly often in the course of business.

Q. Now, at that particular interview of August, 1946, what, if anything, took place between you and Mr. Panuch, your superior at the State Department? A. Well, Mr. Panuch volunteered, without any request on my part, or any question, that he had gone over my record and he was satisfied. The specific words I remember him using were, "Don't worry, Carl, it is all O. K."

And I said, "Well, that is very nice. I appreciate it a lot," and I really meant it, you know, his looking into

things in my behalf. But I also said to him at that time, very specifically, "I will have to think it over and I will have to consider it."

And he leaned over, we were both sitting down, and put his hand on my knee, and said, "Carl, we want you here."

And I said, "Well, I like it too, but you know, this kind of thing happens again." And he said, "So long as Russell or I are here, it will not happen. You have nothing to worry about."

Q. Now, I will direct your attention to on or about the 15th of November, 1946. Did you have another conference or interview with Panuch, your superior? A. Yes, I did.

931 Q. What took place, then, in substance? A. I would like to say there are two sentences I remember with tremendous clarity that I can swear to. The rest I can tell you in substance.

Q. Did they take place at this interview? A. Yes, sir. It was the first sentence and the last sentence of that interview.

Q. What was it? A. The first sentence was, I came in and he was sitting at his desk with his back to the window, and I came in and sort of grinned——

The Court. We don't need all the details while he was sitting at the window.

By Mr. Ford:

Q. What did he say and what did you say? A. I said to him, "Joe, I have come to give you a surprise. I hope you don't like it." So he kind of looked at me and said, "What is it?"

I said, "I am going to resign." So he started laughing. He said, "Well, I think you are doing the wise thing. We will miss you, but things are tough. With a Republican Congress, it is going to get worse, and I think you are wise." And I said, "Well, Joe, I got a career to make. I am a young man. I have got to earn a living, and I figure

there is just no future for me in the State Department as things are."

932 He asked me what I was going to do. I told him what I was going to make. I told him I was going to make films for the labor movement. During that time also I told him I had made a film called "Deadline for Action." First, he made believe he hadn't heard it. Then when I said, "Look, quit kidding," he started laughing and said, "Why do you have to be so radical?", and I said, "Radical? Have you looked at the film?" And he said, "No," and he laughed again, and I said, "It is a big hit. Four million people are looking at it all over the country."

The Court. We are not concerned with that.

By Mr. Ford:

Q. After he had asked you to stop being—"Why are you so radical," then how did that conference end up or that conversation? A. It finally ended up by my saying to him, in substance, this still is, "Well, Joe, I want to know from you if you in your own mind it is all clear, because as I told you before, I am not resigning from the State Department under fire. But if it is clear, I would like to resign as of the close of business today." And he said to me, "O. K., sure." No remonstration; didn't say no.

The last sentence he said, which I definitely remember very clearly, he accompanied me to the door, held my hand, and not only shook it but held it, and walked me

933 up to the door and said, "Don't worry, Carl, you and I are boys in the big league."

• • • •

Q. I hand you what has been identified as Government's Exhibit 33-A-1, a leaflet headed, "Parade For Peace."

Now, I will ask you whether or not you ever had anything to do with that pamphlet. A. No, sir.

Q. When, to your knowledge, was the first time you ever saw that particular pamphlet? A. I just seen the orig-

inal now for the first time. I saw a photostat of this perhaps two or three days ago. I do not remember.

Q. Was that the first time you ever saw it, to your knowledge? A. That was the first time I ever saw this.

• • • •

934 Q. I hand you what has been marked for identification Government's Exhibit number 33-A-2, which appears to be an editorial out of a newspaper, and ask you whether or not you have anything to do with the preparation, the making, editing or publishing of that document. A. No, sir.

Q. When, to your knowledge, is the first time you ever saw that document? A. At this trial.

• • • •

Q. I will now hand you what has been marked for identification as Government s Exhibit 33-A-3, which purports to be a newspaper article, and ask you whether or not you ever had anything to do with the preparation, the making, the distribution or publishing of that document?

935 A. No, sir.

Q. When, to your knoweledge, is the first time you ever saw it? A. At this trial.

• • • •

Q. I will now hand you this leaflet which has been marked as Government's Exhibit number 33-N-1, and ask you whether or not you ever had anything to do with the preparation, the printing, the publishing or the distribution of that pamphlet. A. No, sir.

Q. When, to your knowledge, is the first time you saw that pamphlet? A. At this trial.

• • • •

Q. I now hand you Government's Exhibit for identification 33-N-2, and ask you whether or not you ever had

anything to do with the preparation, the publishing or the distribution of that pamphlet. A. No, sir.

936 Q. I will ask you, to your knowledge, when is the first time you have seen that pamphlet? A. At this trial.

• • • •

I will ask you to look at this pamphlet, which is Government's for identification 33-R-1, headed, "Free Earl Browder," and I will ask you whether or not you ever had anything to do with the preparation, the distribution, or the publishing of this article. A. No, sir.

Q. When, to your knowledge, is the first time you saw that? A. At this trial.

• • • •

Q. I will hand you what has been marked for identification for the Government as 33-T-1, which is a pamphlet of two pages, and ask you whether or not you ever had anything to do with the preparation, publishing, or dis-

937 tribution of that pamphlet. A. No, sir.

Q. When, to your knowledge, is the first time you saw that? A. Here in this courtroom.

• • • •

Q. I now hand you what has been identified as Government's Exhibit 33-X-1, "March Against Hitler," and I will ask whether or not you ever had anything to do with the composition, publishing or distribution of that pamphlet. A. Yes, sir.

Q. And tell us what you had to do with that pamphlet, if you please. A. I was responsible for its being drawn up. I checked it, contributed to the words, was responsible to seeing that it was printed, was responsible to see that it was distributed, and that is that.

Q. And what organization was it distributed by? A.

This was the "East Side Conference to Defend America and Crush Hitler."

Q. And is that the one you were executive secre-
938 retary of? A. Yes, sir; it is.

• • • •

Q. I will show you Government's for identification Exhibit number 33-X-2, which is a pamphlet which is mostly written in Italian, and ask you whether or not you ever had anything to do with the preparation, publishing or distribution of that pamphlet. A. Yes, sir.

Q. What did you have to do with it, please; tell us. A. Well, a large section of this pamphlet is newspaper clippings from the greatest—largest, I should say—Italian-American newspaper in New York, and they had a long review about the parade that the East Side was going to hold, and I took this because I knew that the Italian people read it, and took a crayon and pointed out what was being said in it, and put in the "We are all united." That is what "Siamo Uniti" means.

Q. That is the Italian of it; correct? A. That is the Italian of "We are all united," and asked people to come to the parade on the East Side.

Q. And did you see that that was printed, published and distributed? A. I was completely responsible for it, sir.

939 Q. And that was for what organization? A. The East Side Conference to Defend America and to Crush Hitler.

• • • •

Q. I will hand you what has been identified as Government's 33-X-3, and ask you whether or not you had anything to do with the preparation, the publishing or the composition or distribution of that leaflet. A. No, sir.

• • • •

953 *Carl Aldo Marzani*

* * * *

Direct Examination—Resumed

By Mr. Ford:

Q. I would like to hand you what has been marked Defendant's Exhibit No. 8.

* * * *

954 Q. I will ask you whether or not you had anything to do with either the preparation or the distribution of that document. A. Yes, sir.

Q. What? A. I was responsible for it, I wrote parts of it, saw that it was printed, had it collected from the printer, and saw to it that it was distributed.

Q. Now, Mr. Marzani, do you know a Louis Harper, who was a witness called in this case by the Government? A Yes. He was a good friend of mine on the East Side.

Q. When did you first meet Louis Harper? A. I don't recall exactly, but it was somewhere in late 1940, the middle of 1940.

Q. Under what circumstances did you meet Louis Harper? A. Well, with Mr. Harper on the stand, that refreshed my recollection, and as I recall, it was something like this:

I came home from the University one evening and came in and there were several people in my apartment, and my wife introduced me to him and said, "Here is my husband Carl," and then introduced him as either Mr. Harper or Louis Harper, but that is the recollection I have.

There was a discussion going on when I walked in referring to something which had happened quite recently on the East Side, of which I am sure there is a

955 record——

Mr. Kelley. Just a moment. That is not respon-

sive to the question. He said under what circumstances did he meet him.

Mr. Ford. I will bring it out.

By Mr. Ford:

Q. How do you happen to recall that Harper was at your house on this occasion? A. Well, part of the reason is because I have been trying to check back over the time after that man was on the witnes stand. The specific thing that recalled it to me was that there had been an accident —incident—at that time around the East Side of which there must be a record in the police files, concerning the beating up of two Negroes; two Negroes and a scout car were involved——

The Court. Just a minute, sir. We are not interested in that.

Mr. Ford. I am now establishing the fact of how he happens to recall back seven years ago of this meeting and the meeting with Harper at his house.

The Court. Yes, sir, and it could have other purposes, Mr. Ford.

Suppose you come to the bench.

Mr. Ford. All right.

956 (Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice as follows:)

The Court. I do not think we are interested in an outbreak here about the Secretary of State and the FBI, sir. We do not want that to occur again.

Mr. Ford. No, and I do not think this will be one of those occasions, your Honor.

The Court. I believe this will lead right up to an attempted prejudice. I am not charging you with that, however.

Please do not misunderstand me, Mr. Ford, but he very significantly makes use of those things.

Mr. Ford. Well, your Honor, would you say that the

Government is making use of it when one of the Government's witnesses took the stand and said that Marzani advocated and fomented the colored situation?

They have testified to it.

The Court. That is a fact.

Mr. Ford. He is stating this is a fact.

The Court. I misunderstood what you said, apparently.

Mr. Ford. The Government witness, on this racial business, has testified that Marzani fomented and agitated discontent among the Negroes.

957 The Court. Let me ask you the purpose of this, then, sir.

Mr. Ford. The purpose of this is to identify it, and then I am going to have him recall what occurred when Mr. Harper was there.

The Court. Are you going to fix the date?

Mr. Ford. Oh, yes. He has fixed it as late in 1940.

Mr. Kelley. We are talking about recruitment of Negroes in the Party.

This is an isolated instance, and studiously will result in prejudice to the jury.

It does not tend to refute what he may have done in the interest of recruiting party members. The mere fact that he might have been appalled at somebody being beat up, it does not disprove it, your Honor.

The Court. I think it is leading to that point, Mr. Ford, particularly in view of the outburst we received from him in connection with the FBI and State Department.

Mr. Ford. Well, he is going to testify that at that time when he came home from the University—and he is testifying this is the first time he knew him—under the circumstances outlined, and that when he came home, that is what they were talking about, and he advised Harper that the way to do that was that if Harper believed that, to write to the Police Commissioner and submit the names, because he felt that the Commissioner would take

958 care of anything that was wrong. And that is first

how he remembers meeting the witness Harper, who is a witness against him, and secondly, those were the circumstances, and that was not a Communist Party meeting but it was——

Mr. Kelley. There could be no fair trial before this jury if you go into the beatings——

The Court. I am still conscious of his outburst with reference to FBI and State Department, sir. I think it was totally uncalled for, and I am leery that that is just what we are going to fall into here, Mr. Ford, and I hope that we are going to go to the jury without prejudicial bias, sympathy or hatred or any feeling for or against.

Mr. Ford. I hope we are too, your Honor.

We can if we have to relate the instances as to what happened and that they are true.

I do not want you to think that I am going to argue racial bias or prejudice, because your Honor has told me how you are going to instruct the jury on that point, and that takes care of that.

The Court. And I certainly am going to instruct them on that. I think I have that duty.

Cannot we go from this thing to tie it up without making this reference?

Mr. Ford. I do not think there is any possible way.

959 I am going to ask him when was the next time he met Harper and where. I have it all mapped out here.

The Court. Well, the prejudice has happened here, so far as this is concerned, but in the future if you find yourself in a situation like that, will you please approach the bench?

Mr. Ford. Would your Honor tell me, if I find myself in that, please?

The Court. In the situation——

Mr. Ford. What situation?

The Court. It seems a very strange thing to me, without

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knowing the facts, that he is going to remember an incident or instance in 1940 because of two Negroes having been beaten up.

Mr. Ford. Your Honor, you have not got quite the clear picture yet, because he has not finished telling all about it. We stopped him before he completed about the meeting at his house with Harper.

The Court. But it is because of that that he remembers everything else.

Mr. Ford. Harper has testified that at that time there was a meeting at the defendant's house which was a Communist Party meeting. We intend to show first that it was not any such thing, and secondly, what it was.

Mr. Kelley. You have not fixed the date or the same year or anything.

960 Mr. Ford: All the matters concerning Hewitt and Drew, I have personally prepared last night, and for the purpose of shortening the trial. I picked out the testimony of those three witnesses which I expected to meet.

The Court. Yes. My point is, as to sympathy and prejudice, which I do not want a part of this case.

Mr. Kelley. If your Honor please, the Government would not want to move for a mistrial after the expense and time involved here, but in the studied manner, as I see it, this witness has chosen his opportunity to inject obviously prejudicial matter into his testimony, and if it persists the Government will have no course but to feel that in the interest of justice it may needs best move for it.

The Court. We will come to that when we reach it.

Mr. Ford. I challenge the statement that Mr. Kelley just made that there is a study.

Mr. Kelley. The record will show.

(Counsel returned to the trial table.)

By Mr. Ford:

Q. Now, at that time that Harper was at your house, were there other people present? A. Yes, sir.

Q. And was there a discussion going on at the time when you arrived at your house from N.Y.U.? A.
961 Yes, there was.

Q. And——

Mr. Ford. Your Honor, I do not see how I can ask it except to bring out the discussion.

The Court. All right, sir.

By Mr. Ford:

Q. And after that discussion regarding certain incidents that happened in the neighborhood, was it? A. That is correct.

Q. And you talked it over with Mr. Harper and the others? A. That is right. I said that I was sure——

Q. What did you say to do about it? Do not say what he was writing about, but say what you told him to do about it. A. I told him I was sure the Police Commissioner would not like what had taken place; would not condone such actions, and I suggested that a letter be drawn up by whoever was there as witnesses, and the neighborhood people, to draw up such a letter and send it.

Q. Now, at that time, was that a meeting of the Communist Party, or was there anything mentioned on that occasion when Harper was at your house about communism? A. No, sir.

Q. Was there anything mentioned other than what you have described here in a general way took place?
962 A. No, sir.

Q. Now, other than that occasion, was Harper at your home on any other occasions, in addition to that? A. Yes, sir.

Q. I wonder if you could tell me under what circumstances he was there. A. Well, I can't recall every specific detail. I do know that he was there several times, because we were quite friendly. In one case I know he called for me when we were going to a meeting at a church that he had asked me to speak to.

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Q. Do you know the name of that church? A. I do now, on the basis of testimony here. I assume that it was the Church of the Living God.

Q. And when you say he called for you, you mean he came to your place? A. That is correct.

Q. And you left with him? A. That is right.

Q. Now, was there any other occasion when Harper was at your home? A. As I say, I am sure there have been, but I just can't put my finger on them.

Q. Now, Harper has testified here that you were never at his home.

963 Now, is that true or false? A. False.

Q. Were you at Harper's home? A. Yes, sir.

Q. On approximately how many occasions do you remember your being at Harper's home? A. At least three times with a definite recollection. There may have been more.

Q. I wonder if you will tell us under what circumstances you were at Harper's home? A. One specific circumstance was—I should mention that some time in knowing Harper, he had explained to me what the National Negro Congress was, its aims, and so on, and had asked me whether I would ever speak; and I said if it didn't conflict with what I was doing I should be happy to help at any time, he should feel free to call me.

And some time, I don't know whether it was on the street or just exactly where—it must have been on the street, I guess— he asked me would I speak at a meeting and I asked him when, and he told me, and it must have been all right, not conflicting with my classes, and I said sure.

Then he suggested that I stop at his house and discuss it, and we did. And that was one specific time.

Another time he had asked me up there, he had several people there discussing about housing problems.

964 And that sticks in my mind because when I came

home I told my wife that I had never seen such a place as where Harper was living, and it sticks in my mind so very clearly because he was so poor that he couldn't even afford electricity and he had lamps or either candles or lamps in that house.

Q. Was there any electricity in the house where you went to visit him? A. I think so. I remember—I think there were lights in the hallway, and I think it was poverty rather than anything else.

Q. Now, taking up the occasion when you were at this church, I wonder if you would tell us what was that a meeting of, at the church—do you recall? A. It was told me that it was and introduced as a meeting of the National Negro Congress .

Q. And when you were there at that church did you see Harper? A. Oh, yes, we went together.

Q. And did you speak in that church for the National Negro Congress? A. I did.

Q. And what were the things you said? A. Well, I can't tell you word by word, but generally—

Q. In substance. A. It was that there were
965 problems on the East Side, particularly housing. The East Side itself is very bad. Tenements have been condemned since 1890. Luckily, it has all been cleared up now. The Metropolitan Life Insurance is putting up some wonderful housing projects.

Q. Tell us what you said there at the meeting, amongst other things, about housing. A. I said that if—you know, things would have to be done, but that it would require patience, organization, good will, and most important of all, and it was the thing I was most interested in, that we were all in this thing together, that they should not think any group in the community was more responsible than some other group, that people on the East Side all had basically the same problem.

Q. And did you tell them that at that meeting? A. Yes, sir, in substance.

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Q. At any time when Harper was at your house or you at Harper's house, was there ever a Communist Party meeting? A. No, sir.

Q. At any time that Harper was at your house or you at his house, was communism ever discussed at any of those visits? A. No, sir.

Q. To your knowledge, was Harper a member of the Communist Party? A. Not that I know of, al-
966 though I did see him at the Communist Party headquarters on Avenue C, and I saw him with the local, the well known Communist organizer on the East Side.

Q. Who was he? A. His name was Appel, Bob Appel.

Q. When you saw Harper in that area on that occasion with a man by the name of Bob Appel, was Bob Appel well known throughout the whole East Side as a Communist leader? A. Yes, sir.

Q. Do you know or did you ever know a George Hewitt, alias Tim Holmes, alias William Jackson? A. I never knew or saw that man in my whole life, until this trial.

Q. Now I will ask you, have you ever met or been introduced to an Archer Drew? A. No, sir.

Q. Have you ever been introduced or met a person by the name of Bill Easley? A. No, sir.

Q. Have you ever met or have you ever been introduced to a person by the name of William Johnson? A. No, sir.

Q. To your knowledge, have you ever seen the witness Drew other than at this trial? A. Well, I tried
967 very hard since this trial began, and the man went on the stand, to place him. I tried very hard to recollect his face, his figure. To this moment I have not succeeded in doing so. I would not deny that I might have seen him or that he might have seen me.

According to his testimony, he was at least one place where I know that I was, and that was the Church of the Living God.

Q. Could Drew have been to the church, at that meeting, without your particularly recognizing him? A. Yes.

The Court. Did I understand you to say, sir, that you only saw Drew at this trial, except for that possible meeting at the Church of the Living God?

The Witness. To the best of my recollection. I didn't say that I saw him at that place.

The Court. You said you only saw him at this trial?

The Witness. This trial is the only place I saw the man Drew.

The Court. Very well. Excuse me.

By Mr. Ford:

Q. Now, there has been a building or meeting place mentioned in this trial as being at Avenue C, somewhere around Fifth or Sixth Street, I think it is. Have you ever been to that building? A. Yes, sir. Many
968 times.

Q. Would you kindly tell us under what circumstances you have been to that building on Avenue C and Fifth and Sixth?

By the way, first, how far is it from where you live? A. Oh, three or four blocks; something like that.

Q. Under what circumstances were you at that building? A. I was on my way home from the University and very often in the evening—often; once in a while, I should say—I would stop there either to see a friend or to pick up my wife or sometimes I would go there for an election rally. I can recall at least one occasion where I was at an election rally. I think once I was at a meeting of a discussion group, and at least once, and perhaps more, at a neighborhood dance where the whole neighborhood turned out and had dances there.

Q. Do you recall in addition to that, other times and circumstances when you were there at that building? A. Not offhand.

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Q. Now, on any of these occasions when you were at that building, did you see Officer Drew there? A. Not that I recall.

Q. Have you ever been a member of the Communist Party? A. No, sir.

Q. Have you ever attended meetings of the Communist Party anywhere? A. No, sir, not as Communist
969 Party meetings.

Q. What do you mean by that? A. Well, I assume that if there was an election rally, for example, the specific one I happened to remember was a Communist Party candidate, Earl Browder. There was a big election, a lot of noise in the newspapers, I was very curious, and I attended the election rally. Obviously it was a Communist candidate speaking. I do not consider such a meeting a Communist Party meeting.

Q. Have you ever contributed any services for the Communist Party? A. No, sir. May I say one thing there, because it has been brought out before?

Q. Yes. A. It was brought up at the Civil Service Commission and it was brought up and settled then.

The question was raised that I signed a petition for the Communist Party——

The Court. Just a minute, please.

Is this responsive to your question?

Mr. Ford. I think so, your Honor.

The Court. Read the question, please.

Mr. Ford. May I reframe the question?

The Court. Yes, sir.

970 By Mr. Ford:

Q. Has the question ever been brought up to you regarding the signing of what are referred to as Communist Party petitions? A. Yes, it has.

The Court. Was that in your original question, sir?

Mr. Ford. Yes, sir.

By Mr. Ford:

Q. What do you have to say about that? A. What I started to say was that the question of whether that was a service or not has been discussed with me, and I would like to say that the purpose of signing a Communist Party petition or collecting a Communist Party signature was in order that the Communist Party be on the ballot so the people could decide whether or not the Communist Party candidate should be elected or should not be elected.

I do not consider that a service to the Communist Party. I consider that a service to myself as an American democrat and to the American way of life.

The Court. Just a minute.

Mr. Ford. Well, he has given the purpose and the reason why he——

The Court. You asked him if he signed it, sir.

Mr. Ford. Yes, and then I asked him to explain that, your Honor.

971 The Court. I didn't get that part.

By Mr. Ford:

Q. Have you ever distributed any leaflets or pamphlets for the Communist Party? A. No, sir.

Q. Have you ever composed or edited any leaflets or pamphlets for the Communist Party? A. No, sir.

Q. Have you ever lectured or given any instructions on the Communist Party? A. No, sir.

Q. Have you ever discussed Communism or the Communist Party with your wife? A. Very seldom, sir. It was one of the things we didn't see eye to eye, and we just stayed off the subject.

Q. Have you ever gone under the name of Tony Whales? A. No, sir.

Q. Have you ever used the name Tony Whales? A. No, sir.

Q. Have you ever been called Tony Whales? A. I have never been called Tony Whales. I was often called Tony.

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Q. What, if any, political parties have you been a member of? A. I have been a member of the Labor
972 Party in England, a Labor Club, and I have been a member of the American Labor Party in New York City.

Q. Were you ever a registered voter in New York City? A. Yes, sir.

Q. In what party were you a registered voter? A. The American Labor Party.

Q. Have you ever cast your vote at any election for the Communist Party or any of its candidates? A. No, sir.

Mr. Kelley. Just a moment. I object to it as incapable of substantiation, of proof.

The Court. He has answered, sir.

By Mr. Ford:

Q. What are the political parties of the candidates you did vote for and who are some of the candidates? A. Roosevelt—

The Court. Just a minute. What is that for?

Mr. Ford. To show that the way he voted is what he is. That he is known by what he does, and if he voted tickets other than the Communist Party, it shows that he is not a Communist, but that he is of that party for which he voted and the act speaks louder than any words.

Mr. Kelley. I object to it on the specific grounds that it is irrelevant and immaterial to the issues of this case.

The Court I doubt the materiality of it, sir.
973 I will let him answer.

Mr. Ford. The Court says you may answer.

The Witness. I specifically remember voting for a Congressman Klein, who was a Congressman on the East Side, and there is a letter in the record of the Civil Service Commission——

The Court. Just a minute, sir.

By Mr. Ford:

Q. What party was he? A. Democratic Party.

The Court. May we ask you, Mr. Witness, to keep yourself in restraint, sir?

The Witness. Yes, sir.

The Court. No one is deaf, and give us an opportunity of hearing what you are saying.

The Witness. Yes, sir.

By Mr. Ford:

Q. You spoke of voting for Congressman Klein. What party was he? A. Democratic Party.

Q. Have you ever said, "Now the time is ripe for revolution"? A. That is just silly.

The Court. Just a minute.

974 Do you want him to answer your question, sir?

Mr. Ford. Yes, sir.

Now, here is the question:

Mr. Kelley. Wait a moment. Let's keep this record straight.

Mr. Ford. Surely we want to keep the record straight.

Mr. Kelley. The whole thing is unresponsive. He has not answered whether he said it or not.

Mr. Ford. May I put it again, and will you answer this witness yes or no, please?

The Witness. All right.

By Mr. Ford:

Q. Have you ever said, "Now the time is ripe for revolution"? A. No, sir.

Q. Have you ever advocated revolution or the overthrow of this government? A. No, sir, and I couldn't have.

Q. Have you ever advocated disintegration of the morale of the armed services? A. I was a member of the armed services, sir.

The Court. That is not responsive.

Mr. Ford. Answer it yes or no.

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The Witness. No, sir.

975 By Mr. Ford:

Q. Have you ever opposed conscription? A. No, sir.

Q. Have you ever opposed what was referred to as the Smith anti-strike bill? A. Yes, sir.

Q. Have you ever counseled or instructed anyone to sow resentment and discontent among the Negroes by agitating racial discrimination? A. No, sir. On the contrary, I have always tried to remove the causes of such discontent.

Q. Have you ever been accused of being a member of the Communist Party by the Police Department of New York? A. Yes, sir, 1941, and they apologized for it.

The Court. Now, Mr. Witness, just a minute.

Mr. Ford. Wait a minute now.

The Court. You are a man of some learning. Now, you can restrain yourself, and you wait until the question is put, and then answer the question.

By Mr. Ford:

Q. Now, Mr. Marzani,—

The Court. Now, have I made myself clear to you, sir?

The Witness. Yes, sir, and I am very sorry.

By Mr. Ford:

Q. Where is your wife at this time? A. She is

976 home, sir.

Q. Is she physically able to be in attendance at this trial as a witness? A. She is five months pregnant and under the advice of doctors she has been urged not to go under the excitement of this trial.

Mr. Ford. Now, will your Honor just indulge me for a minute?

The Court. Yes.

Mr. Ford. Would your Honor care to have me explain this at the bench? I want to ask some further questions.

The Court. Very well.

(Counsel for both sides approached the bench and con-

ferred with the Court, in a low tone of voice, as follows:)

Mr. Ford: I am now going to ask him whether or not in July, 1946, he entered into a contract—that in July, 1946, I want to ask him about that time in connection with a moving picture which he composed and produced, known as "The Deadline for Action." And the purpose is this: Had he been permitted to answer yes and testify about it, this would be my proffer. I would show that on or about July, 1946, he entered into a contract with the United Electrical, Radio and Machine Workers of America, a CIO Union, to produce a film that he personally wrote the script for, produced it, and directed that film, which was
977 entitled, "Deadline for Action."

That the film accurately embodies the beliefs and views which he has consistently held since 1936.

That the film was completed on or about August 30, 1946, and first publicly shown on September 5, 1946; that thereafter the newspapers, particularly the World-Telegram in New York, carried publicity about this film as a Communist film, particularly in signed articles by Frederick Woltman.

He, by the way, is the man whom the witness Hewitt said called him about a picture in the paper about that.

If the film were permitted to be shown, and I have the film in my possession, without any great display I am prepared to show it here to your Honor and the jury in its entire form. It can be shown in the courtroom. It runs for about thirty minutes. We have all the equipment. I didn't bring it to the courtroom for display, but we have the equipment ready to show it, and that the incidents, the graphs, the dialogue and the speeches are highly critical of large corporations and in favor of labor unions.

It would also show his advocacy of views as being entirely constitutional and wholly American; that the picture closes with an advocacy that Americans should go to the

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ballot box to remedy any civic wrongs that, they think are such.

978 He has stated that he was in this moving-picture business. He stated he was in there to make money, and he stated he made the picture, and stated he made it to portray labor, and all.

The Court. And I think practically everything you have in there has been in evidence, and as to the showing of the picture, we will not do that, sir.

Mr. Ford. May I have an exception to your Honor's ruling?

The Court. Yes, sir.

As a matter of fact, Mr. Ford, it could well be that what he would put in the picture would not portray what he was doing, because that is a commercial undertaking. He would be wanting to sell it to people and I assume the Americans are not all Communists.

Mr. Ford: But he would testify that that does do that, advocates his personal views, and it would negative the charge that he advocates revolution.

The Court. He has specifically stated that too, sir.

Mr. Ford. But that is a living object and a product of it.

May I have an exception?

The Court. Yes.

Mr. Kelley. I would like the record clear that the Government's position on the proffer is that it is by virtue of its very description by counsel, a self-serving doc-

979 ument or declaration, and that other than that, it is entirely incompetent, irrelevant and immaterial.

Mr. Ford. May I have an exception?

The Court. Yes.

(Counsel returned to the trial table.)

* * * *

By Mr. Ford:

Q. Did Panuch, your boss in the State Department, ever ask you whether you had ever been a member of the Communist Party? A. No, sir.

Q. Did Panuch ever ask you if you had contributed services to the Communist Party? A. No, sir.

Q. Did Panuch ever ask whether or not you had ever attended meetings of the Communist Party? A. No, sir.

• • • •

980 *Cross-Examination*

By Mr. Kelley:

Q. Mr. Marzani, I believe you testified this morning that you went as a fellowship student to Oxford University some time in the late 1930's. When was it? A. 1936.

Q. And that while a resident of England you make a trip to Spain? A. That is correct.

Q. Did you make but one journey there? A. That is correct.

Q. Did you attempt to make a second? A. Yes, I did.

Q. Did you apply for a passport? A. I applied for a visa, sir, in Paris.

Q. I will ask you to examine defendant's 11 in evidence. Were you refused the consent of your government to go to Spain? A. Everybody was being refused, sir.

Mr. Ford. Wait a minute. I object, as immaterial, and outside the scope of the direct.

The Court. He has answered it, Mr. Ford.

By Mr. Kelley:

Q. Now, I believe you also testified on direct examination and listed the number of countries that you
981 visited on your return journey to the United States. Is that right? A. That is correct, sir.

Q. And in response to a separate and specific question by your counsel you stated that you had not gone to Russit? A. That is correct.

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Q. Now I will ask you whether or not at any time from the moment you contemplated your return journey to this country, you intended to go to Russia? A. I would have liked to have gone, sir, and may I explain why?

Q. Just a moment. Answer my question.

At any time did you intend to go to Russia? A. I wanted to go, sir. I had the—the intention depended upon the Soviet Government as well as myself.

Q. And did you intend to go to Siberia? A. That was one of the possibilities if the Soviet Government would have allowed it. May I explain?

The Court. Was it your intention to go, sir?

The Witness. May I explain?

The Court. You can answer the question, if you intended to go, subject to getting in by the authority of the Russian Government.

The Witness. My wife and I had three alternate routes to go back——

982 Mr. Kelley. If your Honor please, I move that it be stricken.

The Court. Mr. Witness, I think you understand the question, sir.

The Witness. Sir, I am sorry.

The Court. Would you mind answering the question, sir?

The Witness. I had part intention of going; one-third intention.

By Mr. Kelley:

Q. Did you make any effort to get into Russia? A. I certainly did. I applied for a visa.

Q. You wrote a letter, did you not, back to someone in the United States that expressed that intention? A. I didn't have to write a letter. I don't know. I wrote lots of letters.

Q. Do you have any recollection of writing to anyone in this country expressing your desire and intention to go

to Russia and Siberia? A. I never kept my intentions secret, sir.

Q. You have not answered my question. A. I don't know, sir. I may have written letters, yes.

Q. Did you state that you were a member of the Phi Beta Kappa? A. That is correct; yes, sir.

Q. As an intelligent, educated man, I will ask you to listen, please, to my question before you answer it
983 and endeavor only to answer my question.

Mr. Ford. I object to that and move your Honor to withdraw a juror on account of the form of the question and the substance stated in it.

The Court. I will deny it, sir.

Mr. Ford. May I have an exception?

The Court. I think the witness has not answered the question, Mr. Ford.

Mr. Ford. That is not the part I am objecting to, your Honor. It is the things he stated in his question.

The Court. That he was a member of Phi Beta Kappa?

Mr. Ford. And the rest of it as to intelligence, and so on. The entire question.

The Court. I will deny it, sir.

Now, Mr. Witness, the Court will ask you to please listen to the question and to answer the question.

The Witness. I am trying, sir.

The Court. If you can, do; and if you can't, say you can't.

The Witness. Yes, sir.

By Mr. Kelley:

Q. Have you no present recollection of writing to anyone in the United States while you were in England and expressing the desire and intention of visiting Russia and Siberia? A. Not at present, sir, no.

984 Q. Do you have any present recollection that a letter or communication of yours or part of the same was incorporated in what is known as the Williams

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Alumni Review, during the period of your residence in England? A. I have no recollection, sir.

* * * * *

Q. I show you what has been marked for identification Government's Exhibit 37.

I want you to read the quoted portion appearing thereon. Do not read it aloud. Read it to yourself.

And state whether or not it refreshes to any extent your recollection as to whether you wrote or communicated with anyone in this country your desire and intention to visit Russia and Siberia.

Mr. Ford. Do that, but before you answer I want to be heard on it.

(The witness complied.)

Mr. Ford. Your Honor, I object to the question and the answer. Would your Honor care to look at the ex-
985 hibit, first.

The Court. May I see the exhibit?

The Witness. Yes, sir.

(The exhibit was handed to the Court.)

The Court. Yes. Do you want to approach the bench?

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

Mr. Kelley. He has not yet answered the question.

The Court. No.

Mr. Ford. I object to it, first, because it purports to be a printed article in some book or magazine which is unidentified; unidentified as to date or as to magazine. It does not show he had anything to do with the publishing of it, the preparing of it, the inserting of it in the magazine or book or pamphlet, or whatever it came from, and is in no way connected up with him.

Mr. Kelley. Your Honor, I have not offered it. I merely asked him if it does refresh his recollection as to what it is.

I submit if it does refresh him, I can ask him what it is.

Mr. Ford. Secondly, that he has already testified that he did have a desire to go there.

The Court. He said he had a one-third intention.

Mr. Ford. And that he had a like, that he would have liked to have gone there to both places.

986 The Court. I will let him answer the question.

Mr. Ford. Exception.

The Court. Yes.

(Counsel returned to the trial table.)

By Mr. Kelley:

Q. Having read what has been marked Government's 37 for identification, is your recollection now refreshed?

A. Yes, sir.

Q. What is your recollection as to whether or not you did write to someone in this country— A. As I stated before, the recollection is that we had several plans as to how——

Mr. Kelley. No. I say, what is your recollection, refreshed?

The Witness. Your Honor, may I explain?

Mr. Ford. Let him put his question.

Mr. Kelley. I move the witness be instructed. Obviously he began to answer in an unresponsive way.

Mr. Ford. That is why I thought I would stop him.

Mr. Kelley. I will stop him.

The Witness. May I answer the question?

The Court. Mr. Witness, let me again say to you, sir, it is your function to answer the questions that the counsel puts.

987 The Witness. Yes, sir.

The Court. If you can. If you cannot, say you cannot.

The Witness. Yes, sir.

The Court. It is also your function to give your counsel an opportunity to object, if he does, and the reverse of that, sir.

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The Witness. Yes, sir.

The Court. Now, counsel put a question to you which in the Court's opinion is susceptible of an answer. If you can answer it, answer it, and if you cannot, say so.

The Witness. Yes, sir.

Will you repeat the question again?

Mr. Kelley. I will restate it.

By Mr. Kelley:

Q. Having refreshed yourself from Government's 37, what is your testimony as to whether or not you wrote or communicated with someone in this country while you were in England that you intended to go to Russia and Siberia? A. I have no recollection of writing to anyone in this country about that. On the basis of what you have shown me, I probably wrote someone. I have no idea whom or why.

Q. To that effect? A. If that clipping is correct; yes, sir.

• • • •

999 Q. Mr. Marzani, when did you first become connected in any way with the East Side Conference to Defend America and Smash Hitler? A. I don't know exactly, but it was in the fall. I would say about September, perhaps. Somewhere in there, in 1941.

Q. Are you in a position to say that it was not as early as August 12, of 1941? A. As far as my own personal connection, I am not, no. I think it was started quite early.

1000 Q. Are you in a position to state that you were not publicly elected to an office in that organization on the 12th day of August, 1941? A. No, I am not in a position, sir.

Q. That could have been? A. Yes, it could have been.

• • • •

1003 Q. I show you what has been marked Government's Exhibit 38 for identification, and particularly

direct your attention to this portion where I am now pointing, and ask you to state whether or not the reading of it refreshes your recollection as to the date you were named an officer of the organization we were discussing.

• • • •

The Witness. Yes, it does.

By Mr. Kelley:

Q. Now, can you state on what date you were first named an officer of that organization? A. No, I cannot, sir.

Q. To what extent are you refreshed? A. Well, August 14, the newspaper is dated August 14, on Thursday. It says on Tuesday there was such a rally. So I was at that time executive secretary. Whether it was the 10th or 11th, or a week before, I have no recollection, sir.

Q. But at least, was it Tuesday prior to August 14? Is that right? A. Yes, according to that.

Q. Now, to your own recollection, do you remember the date that Germany attacked Russia? A. Yes, sir.

1004 Q. What date was that? A. June 22, 1941.

Q. Now, the organization known as the East Side Committee to Defend America and Smash Hitler did not come into existence until after the date on which Germany attacked Russia, did it? A. That I don't know, sir.

Q. Your recollection was a moment ago that it was in September that this organization was formed.

• • • •

The Court. Do you know when the East Side defense group came into being, sir?

The Witness. No, sir, I do not.

The Court. Do you know when you first became associated with it.

The Witness. On the basis of what has gone on before,

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I said my first recollection was around. September. It now develops it was about August.|

The Court. I think it follows from that, Mr. Kelley, that it was after June 22.

1005 Mr. Kelley. After June 22, yes.

By Mr. Kelley:

Q. After June 22, 1941, did you publicly advocate cooperation with the selective service act and conscription act? A. I imagine I did. I have no recollection. That was one of the functions of the committee.

Q. Did you ever know anyone in the neighborhood of your residence by the name of Mary Fernandez? A. I knew lots of Marys, and the name Fernandez is vaguely familiar, sir, but I cannot place it.

• • • •

Q. I show you what have been marked Government's Exhibits 33-X-1, X-2, and X-3.

Now you have testified that you have seen facsimiles of two of those exhibits before and that you never saw this or a facsimile of Government's X-3; is that right? A. That is correct, sir.

Q. Do you recall the testimony of Detective Archer Drew that he was present at the home of a Mary Fernandez when you delivered all three of those items—X-1, 2, and 3—at that place?

• • • •

1006 A. Vaguely. I don't remember a specific reference to the three.

Q. I will ask you specifically, did you ever deliver any pamphlets or material to the home of a Mary Fernandez? A. I never delivered these things to the home of Mary Fernandez, sir.

Q. I said any pamphlets or anything. A. Not that I recall.

Q. Are you able to say you were never in the home of Mary Fernandez? A. No, I cannot say that, because I cannot recall who the person is.

Q. Do you know a Mary Morse? A. No, sir, I
1007 don't think so.

Q. Didn't you have lunch in 1945 in the City of Washington with Mary Morse and her husband, whom she had just married, and they were on their honeymoon? A. Oh, yes, sir, but I do not recall the name Morse, sir.

Q. What name do you remember the people I have just referred you to as having lunch with? A. Mary.

Q. Just Mary? A. Yes, sir. That is all I knew her as. And now that you mention it, her name may have been Fernandez, but I do not recall, sir.

Q. And you had lunch with this person you knew as Mary in 1945. A. Somewhere in that time, during the period, in Washington I had luncheon with a girl named Mary and her husband; they were newly married, that is how I recollect.

Q. Had you met her husband on another occasion here in Washington? A. No, I had not.

Q. What did she say about him? Did she say, "This is my husband"——

• • • •

1008 The Witness. I can't recall, sir, what she said or didn't say. I know my wife told me we were going to have lunch with Mary and her husband and when we go and meet two people and it is Mary and her husband, I assume it is Mary and her husband.

By Mr. Kelley:

Q. And at no time throughout that incident when you made the acquaintance of her husband did you ever know any name with respect to her or her husband other than Mary? A. As I say, Mary is the one I recollect very distinctly, and I knew her as Mary very distinctly.

Q. Now, you know the person I am talking about anyhow, don't you? A. Yes, sir.

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Q. Were you ever at her home in the East Side of New York in 1940 or 1941? A. I may have been, sir. I don't recall. That is seven years ago.

Q. And you are having difficulty remembering such matters seven years back?

Mr. Ford. I object.

1009 Mr. Kelley. I am testing his memory, your Honor.

The Court. Test it by asking questions.

Mr. Kelley. All right.

By Mr. Kelley:

Q. You testified earlier here, did you not, that you remember precisely what was said at a meeting when you first met Louis Harper?

Mr. Ford. I object, your Honor, because of the word "precisely," because I think your Honor said there were certain things that I was not to refer to in the conversation, and I obeyed your Honor, and I think this would violate that.

The Court. What are you indicating?

Mr. Kelley. Trying to establish how good or bad or convenient this man's memory is.

The Court. Well, sir, ask him questions and I will pass on them.

By Mr. Kelley:

Q. You do remember distinctly what was said by you and what was said by others on the occasion you first met Louis Harper; is that right? A. I don't remember distinctly. I remember the subject matter and there is a reason for it which I am not referring to, because I am not allowed to refer to it.

Q. Now, you say you knew Mary, and your wife told you that she was in Washington and you were going to have lunch. When your wife told you that, did you

1010 know the individual she was talking about? A. Yes, I did.

Q. Describe her. A. Well, she was, as I recollect, a rather dark girl, about—shorter than you are. That is about all, I think, that I can recollect right now.

Q. You can't remember where she lived with reference to your house in New York? A. She lived above my house. That is, I lived on 6th Street and she lived above that. Just exactly where, I am a little vague.

Q. And you are so vague you can't remember whether you were ever in her home?

Mr. Ford. Wait a minute. I object to that as being argumentative.

The Court. Were you ever in her home before?

The Witness. I don't recall, sir.

The Court. All right.

By Mr. Kelley:

Q. You may have been? A. Yes, sir. I was in many homes on the East Side.

Q. Do you recall Detective Drew testifying that at meetings of the Communist Party attended by himself and yourself, there were on occasions present a woman named
1011 Mary Fernandez, also known to him as Mary Farnum? A. I recollect Detective Drew testifying to that—Jean something, that is all.

Q. Do you admit or deny that such took place? A. In my presence, sir, I deny it.

Q. In what? A. In my presence. I wasn't there. I don't know who he meant, where or when.

Q. And you don't know who he meant when he said Mary Fernandez, also known to me as Mary Farnum? A. Not at the time he testified, sir.

Q. Do you remember meeting a Mary Fernandez, or this same Mary with whom you had lunch—strike the question.

Referring now to the individual whom you recall only as Mary, with whom you had lunch in Washington, do you recall knowing her when you were the executive secretary of

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the East Side Conference? A. I remember the girl, sir, all through the East Side. I don't remember any particular date or time.

Q. Now you say you remember her—Mary—all through. In what other connections do you remember her? A. I remember Mary as a friend of my wife's; someone my wife knew.

Q. Do you remember her being in your home? A. Not specifically, although she could very well have been.

1012 Q. On how many occasions would you say you have talked with her and seen her back at the time you lived in New York? A. I couldn't say, sir. Several times.

Q. Do you remember Detective Drew testifying that at the meetings of the Communist Party which he attended and which he testified you attended, there was present an individual known to him as Sema Sverdlove and also known to him as Lena Powers? A. I recollect him talking about Sema Sverdlove, sir.

Q. Don't you recall him saying she was also known to him as Lena Powers? A. It didn't particularly strike me.

Q. Do you know Sema Sverdlove? A. Oh, yes, sir.

Q. You know her well? A. Pretty well. I have known her husband a lot better.

Q. You have entertained the Sverdloves in Washington, haven't you? A. Oh, yes.

Q. On particular occasions? A. I don't remember the time.

Q. Many times, would you say? A. I don't think so.

Q. How many times, would you say? A. I

1013 couldn't. A couple. It wouldn't be more than three. It was at least once.

Q. Have you no memory of entertaining them over a New Year's holiday? A. No, I am sorry, I don't remember any particular New Year you are referring to.

Q. Did you ever know Sema Sverdlove by the name of Lena Powers? A. No, sir, I did not.

Q. You visited socially back and forth with Sema Sverdlove and her husband frequently in New York when you lived there, didn't you? A. Oh, yes, sir.

Q. Where did they live in reference to you? A. They lived—I think they had two addresses. At one time I think they were somewhere on 13th Street, and another time I think they lived on 2nd Avenue about—I don't know exactly, but there was a St. Mark's Church at the corner and they lived at 2nd Avenue off that church.

Q. You testified earlier that—I don't want to put a word in your mouth, I don't think it was "notorious"—that a Bob Appel was well known throughout that entire area as an official of the Communist Party; is that what you testified to? A. Substantially, yes.

1014 Q. You knew him, did you? A. Yes, I did.

Q. Do you know when and where you met him? A. No, I don't.

Q. For how long a period did you know him? A. Oh, I would say about a year or so, '40 or '41.

Q. Did you used to see him and talk with him at the Communist Party headquarters at 44 Avenue C? A. Sometimes; yes.

Q. You say you frequently went there? A. Frequently? I went there several times.

Q. What would you call several? A. Oh, seven, eight, nine, a dozen.

Q. Now, you testified that on occasion when returning from N.Y.U. you would stop by there at the Communist Party headquarters to call for your wife. Did I understand you to say that? A. That is correct.

Q. What was the occasion of calling for her at that place? A. Well, she would say, "Tonight when you come home, stop by and see if I am there."

Q. What business, if you know, would she have there?

Mr. Ford. I object to what business his wife would have. His wife is not on trial.

1015 The Court. Sustained.

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By Mr. Kelley:

Q. Did you frequently find her there? A. Sometimes, yes.

Q. And you state that you never attended a meeting of the Communist Party there? A. I stated, as I recall, sir, that I never attended a meeting of the Communist Party; that is to say, there were election rallies specifically——

Q. Did you say rally or rallies? A. One; perhaps two. One I remember distinctly.

Q. All right. Aside from those. A. I did not consider that a meeting of the Communist Party.

Q. Let's throw those out.

Now, what other meetings were you at there?

A. Dances, once or twice, a discussion group that was being held on Spain once, that I recollect definitely. It may have been one or two other times, but that is about all.

Q. As to these one or two other times, what was the nature of the meeting? A. I say, there may have been, because I don't remember.

Q. You have told us all that you remember now concerning meetings that you attended at 44 Avenue C?

1016 A. To the best of my recollection; yes, sir.

Q. Did the Communist Party conduct street meetings from time to time in that area? A. I imagine they did.

Q. I don't want what you imagine. Did you ever see any?

The Court. Do you know, sir?

The Witness. Yes. You can't tell they are Communist meetings. In other words, you walk down the street and it may be an American Labor Party or Communist Party. When you walk by, you hear, if you catch it, you know, if you don't, you don't.

By Mr. Kelley:

Q. When did you catch it, how did you know it was a Communist Party? A. You catch it if someone said they are speaking for the Communist Party.

Q. Wouldn't they distribute literature with the name of the Communist Party on occasions? A. On occasions I imagine they did.

Q. And would you frequently come across meetings of that character, the Communist Party, down there? A. I wouldn't say frequently, sir.

Q. Well, many times, several times? A. No, several times.

1017 Q. And did you observe or pay any attention to what was being said at those meetings? A. I would stop by for a few minutes if I was in a hurry, and then go on.

Q. Did it come to your knowledge in that way, or otherwise, that prior to the 22nd day of June, 1941, the Communist Party in that area opposed repeal of the neutrality law? A. I knew the Communist Party opposed it, from the New York Times and the New York Herald-Tribune.

Q. That was your source of knowledge? A. My main source of knowledge was the New York Herald-Tribune which I read every day.

Q. And were you aware at that time that the Communist Party prior to June 22nd, 1941, opposed military conscription in the United States? A. I think I did, yes.

Q. Well, is there any doubt about it in your mind? A. No.

Q. Were you similarly aware that the Communist Party, prior to June 22, 1941, was opposed to lend-lease aid to England? A. I think that is correct.

Q. And similarly aware that the Party opposed passage of an anti-strike bill? A. That I don't know,

1018 but I assume they would.

Q. And similarly as to collaboration between the party members, the Roosevelt Administration and Great Britain. Do you know their attitude on that? A. I don't understand that question.

Q. Were you aware of the attitude of the Communist

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Party in that connection prior to June 22, 1941? A. In connection with what?

The Court. Between the United States and Great Britain.

Mr. Kelley. Yes, between the Roosevelt Administration and Great Britain.

The Witness. I know they opposed lend-lease and such matters; therefore they opposed the Administration.

By Mr. Kelley:

Q. And are you aware of the fact that after June 22, 1941, the Communist Party advocated all-out aid to Britain and to Russia? A. I assume they did, yes, sir.

Q. And they advocated that after the attack of Germany on Russia and before Pearl Harbor, did they not? A. I imagine they did, yes.

Q. Well, we don't want your imagination. If you don't know, say so. A. Well, sir, I know a good deal about what was going on in the country at that time, and I assume that since the Communist Party had certain
1019 positions, that certain things would follow from them. In other words, since I know they wanted aid to Russia, therefore I would assume that they wanted us to send that aid. That is all I mean, when I say I assume.

Q. Do you know what I mean when I use the expression Communist Party line?

Have you ever heard it? A. Yes, sir.

Q. And you were aware that the line abruptly changed after June 22, when Germany attacked Russia; you know that? A. So I was told; yes, sir.

Q. And do you deny at any time prior to July 22, 1941, having personally opposed conscription? A. I do, sir.

Q. Do you similarly deny at the same period having opposed the repeal of the neutrality law? A. I do, sir.

Q. Do you admit after June 22, 1941, and prior to Pearl Harbor, having personally advocated all-out aid to Russia and England? A. And China; yes, sir.

Q. On your trip to Europe, while in the military status, I believe you testified you went to London? A. That is correct, sir.

1020 Q. And to England—to France, I should say. A. That is correct.

Q. Now, what other countries did you go to, whether on official business or unofficial business, during your period in Europe in military status? A. I went nowhere on unofficial business.

On official business I was in France for a short time, Germany for a short time, and in Italy for a longer time.

Q. Were you in Spain or Portugal at that time? A. No, sir, I was not.

Q. And you made only one trip overseas while in military status? A. I was overseas eight months.

Q. You haven't answered my question.

The Court. Do you understand the question, sir?

He asked you if you made more than one trip in military status.

The Witness. No, sir; one trip.

• • • •

Q. Mr. Marzani, I show you what has been marked in evidence as Government's Exhibit 25. Can you identify it? A. Yes, sir. I have seen this before.

1021 Q. What is it? A. It is an independent nominating petition for the Communist Party in the name of an independent body making nomination.

Q. For whom, nominating whom? A. Earl Browder to Representative in Congress, Congressional candidate.

Q. Does your signature appear thereon? A. Yes, it does.

Q. In what capacity? A. In the capacity of a citizen who thinks the man should be on the ballot.

Q. Well, you are in the capacity of a signer or a petitioner, aren't you? A. That is correct, as a signer.

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Q. Other names appear thereon of other petitioners or signers, do they not? A. They do.

Q. And at the lower part appears the name of a circulator, does it not? A. That is quite correct.

Q. Did you know that circulator, Henry Cooper? A. I don't recall him, sir.

Q. You may have known him but you don't recall him; is that it? A. That is correct.

1022 Q. As to the other names that appear on there as signers, do you know any of them? A. No, sir; I don't think so.

Q. Now, tell us where you were when you signed that. A. That I don't know, sir. It propably was at my home.

Q. Didn't you once state some people came to your home and talked to you about signing this petition and you signed it there? A. I said probably it was my home. Now that you refresh my recollection, I said that.

Q. Well, is that the fact? A. It must be.

Q. And you stated that you signed it for some particular reason, did you? A. Yes.

Q. Tell the jury what was the reason you signed it. A. The whole reason, sir?

Q. Yes, go right ahead and give us what your reason was. A. I don't know the exact date, but somewhere around '40, about that time, there was a big case in the newspapers in the courts. A man named Earl Browder who was at that time something—general secretary or leader or the chief of the Communist Party in the United States—was under indictment for having used a passport irregularly.

1023 As I recall the facts of the case he was not accused of forging his name to the passport, he was not accused of having a false name, but as I recall he did not answer quite correctly a question on the application blank.

Q. Just to interrupt, what was the source of your facts in that connection? A. I would say the Herald-Tribune, New York Times. It was a very famous case. There were

editorials on the subject and the facts were thrown around.

The specific charge was an irregularity in the passport, I remember that. I don't know what the irregularity was.

Q. Did the people who brought this to you also represent those to be the fact? A. May I finish with the answer, sir?

The Court. He put a question.

Are you satisfied with the answer, sir?

Mr. Ford. Your Honor, he had not let him finish the answer where he says "Give all your reasons for signing it," and he was in the midst of giving his reasons.

Mr. Kelley. I don't want to hold the witness back. Let's have them all.

The Court. Well, I don't know if you want to hold him back, sir, but if it isn't important, the Court does not want to hear it.

1024 Mr. Kelley. I want it indicated that I not trying to throttle this witness, sir.

The Court. Are you satisfied with his answer, sir?

Mr. Kelley. I am satisfied.

The Court. Very well, sir, we will stop there.

By Mr. Kelley:

Q. Now, were you at one time asked whether or not you had, in addition to signing a petition for Browder as a signer, also circulated and solicited others to sign similar petitions? A. Having refreshed my recollection from the transcript of the Civil Service hearing, I find that I was asked whether I assisted my wife in circulating such petitions.

Q. My question is, did you ever circulate any? A. You are asking me now, sir?

Q. I am. A. Yes, sir, I did.

Q. How many? A. I have no recollection.

Q. What is your best recollection? A. Well, you have shown me three, so there is at least three.

Q. Well, may there be more? A. There may be four.

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Q. May there be ten? A. Not likely.

1025 Q. Well, you do have some recollection, then? A. Yes. Well, the amount of work that I would do, yes.

Q. Where did you get the blank petitions that you circulated? A. That I don't recollect. Anybody could have given them to me.

Q. You mean you have no recollection whatsoever as to how you got them? A. No. Somebody gave them to me. It may have been my wife.

Q. Well, you either remember that it was your wife or you can't remember where you got it; is that it?

Mr. Ford. Wait a minute. I object to that question. It is argumentative.

The Court. You say it may be your wife. Is that your best recollection?

The Witness. I said it may have been; yes, sir.

By Mr. Kelley:

Q. Tell us how you set out to solicit the signatures on those petitions. A. Well, I walked up the street and took a building that looked big, so I wouldn't have to do too much walking, and I went up in it.

Q. You say you guess you did. Have you any recollection of what you did? A. Until I saw those col-

1026 lections, sir, I did not even recollect having had them.

The Court. You said that, Mr. Marzani.

The Witness. Yes, sir.

The Court. The question is, now, what did you do in connection with the circulation of these petitions, if you know?

The Witness. I do not recollect, sir. I am saying what was the probable course of action I would have taken.

By Mr. Kelley:

Q. And you have presently no recollection concerning circulating them at all? A. I don't remember the place I collected them or the street.

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Q. Referring, Mr. Marzani, to Government's Exhibit 25, the one which you have testified you signed, did you read it before you signed it? A. I looked through it, yes.

Q. You satisfied yourself of its contents and meaning? A. I satisfied myself as to what it was.

Q. I will ask you to observe that the petition reads, in part,

1027 "I, the undersigned, do hereby state that I am a duly qualified voter of the political unit for which a nomination for public office is hereby made, that my place of residence is duly stated opposite my signature hereto and that I intend to support at the ensuing election, and I do hereby nominate the following-named person as a candidate for nomination for public office to be voted for at the election to be held on the 6th day of February, 1940, and that I select the name Communist Party as the name of the independent body making the nomination, and the letters C. P. in a box as the emblem of such body."

Did you understand that when you read it? A. No, sir.

Q. How did it escape you? A. Are you asking about my mental processes, sir?

Q. Whatever they were. A. I understood signing a petition to put a man on a ballot. It was shown to me as such, I understood it as such, and I understand that is the proper language for such a petition. I do not think, or at least I never regarded it as a promise to vote for a particular candidate.

Q. You mean you signed it with some mental reservations, is that it? A. No. No, sir, I did not say

1028 that.

Q. Well, if you didn't, then you signed for what it stands for, didn't you? A. No, sir, I didn't say that either.

Q. Well, perhaps you can explain it more lucidly. A. I will try again. I say that I signed the petition understanding that this petition would as a result, if successful,

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place a candidate on the ballot. I also understood that this is the proper form, legal form, whereby such a petition is executed. For example, I bought a house, I own a house. I signed a deed. There is a lot of language there. I looked through it. I am informed that this is the proper language —whereases and wherefores—I don't go and figure those things out. I signed it because that is the way a deed is done.

Q. Do you sign an oath without reading it? A. An oath is much shorter, sir, and much more important.

Q. Well, let's come to one thing more important.

I show you Government's 34-A. Have you signed an oath on that paper? A. Yes, I did.

Q. Read it. A. (Reading:)

"Carl A. Marzani, (name of witness), being duly
1029 sworn, says: I am a duly qualified voter of the State of New York and now reside in the Borough of Manhattan, City of New York, in the County of New York, in such State, at 643 East 6th Street, New York City, therein. The said residence is in the 15th Election District of the Sixth Assembly District. I was last registered for the general election in the year 1939 from 643 East 6th Street in the Borough of Manhattan, City of New York, in the County of New York, in such State. The said residence is in the 15th Election District of the Sixth Assembly District. I know each of the voters whose names are subscribed to the above sheet of the foregoing petition containing five signatures and each of them subscribed the same in my presence, and upon so subscribing declared to me that the foregoing statement, made and subscribed by him or her, was true."

Q. So that each of the persons who signed this declared to you that the foregoing statement was true; is that right? A. That is right.

Q. So, if they declared that to you and you made oath upon it, you knew specifically what it provided, didn't you? A. Excuse me, sir.

Q. Answer the question, if you can. A. Well, I cannot, the way you framed it.

1030 Q. You cannot answer that question? A. The way it is framed; no, sir.

(The pending question, as above recorded, was read by the reporter.)

Mr. Ford. I object to the part of it which says they declared that to you. That has no meaning in the question.

The Court. In view of what he just read.

You understand that, don't you?

The Witness. I understand the question, but I cannot answer as framed.

The Court. Why?

The Witness. May I say?

The Court. Yes. Why can't you?

The Witness. Because he implies that those people who signed their signature proceeded to tell me what was up there, which is not the case at all. The people would take a look at the petition, go through it, and I would say, "Does that make sense?" And I don't know if I asked something of that sort, and they would say, "Yes," and that would be the end of it.

The prosecutor framed the question in such a way as to imply that each person would go through and make that statement to me, which was not the fact. I am trying to give as closely as I can the kind of thing that happened.

The truth, the way things do happen.

1031 By Mr. Kelley:

Q. I thought you said you couldn't remember anything about what happened in these petitions. A. That isn't true either, sir.

Q. Now, what do you remember? A. I said I am trying very hard to recollect how these things happened, and I am trying to give a picture of what happened.

Q. I asked you very studiously if you had any recollection of the circumstances surrounding your circulating and soliciting signatures to these petitions. A. And I answer-

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ed that I didn't, because I do not have any recollection of the circumstances.

Q. How can you testify what you asked them or they asked you or anything about it, then? A. When you show me the petition and tell me, "Did they tell you this," then I recollect that specific question, that it wasn't so.

Q. So now your recollection is coming back without these; is that it? A. Well, you said, "Did they read that"—you said down here, "Did they run through that and make that statement to you?" And I said I didn't recollect.

You are asking me in such a way that I have to answer yes. That is why I don't like the way it is framed.

1032 Q. Let's get this certain. You do not remember anything connected with the circumstances of your circulating those petitions and obtaining signatures thereto; is that right or wrong? A. It is right, but I can make inferences too.

Q. So you are testifying now from inferences when you say that was asked and what you asked. Is it an inference or recollection? A. I am trying to remember what is likely to happen. My recollection is I don't recollect.

Q. All right. What did you do with these petitions when you had completed them?

(The witness examined the documents.)

A. I probably took them home.

Q. What do you mean "probably"? A. Well, I don't remember going anywhere else immediately with them. I notice here there is a notary public on it, and I am looking at it and trying to recollect whether I went to his office, whether the man was at my house, and I don't recollect. I say probably it was at home, because if I had gone to an office I might have remembered.

Q. That is what we want to know. Do you know that notary public? What name is listed on there? Answer that first. A. I can't read the handwriting, but under-

neath there is a stamp which says "Paul D. Sam-
1033 berg, Notary Public."

Q. Do you know him? A. I don't remember.

Q. You have no recollection of who he is? A. I don't recollect him at all, sir.

Q. Were you ever at the state headquarters of the Communist Party in New York? A. I don't remember right now.

Q. Can you testify that you didn't take these petitions to the state headquarters of the Communist Party and there make oath in front of Samberg to it? A. I can't testify to that, sir, because I don't recollect it.

Q. You may have done that? A. Very unlikely.

Q. Why do you say that? A. Because I would have remembered going to the state headquarters. That is much more sharp than going to my home.

Q. What leads you to think you would take them home? A. Well, I might meet somebody there, my wife might have looked them over. I don't know.

Q. Why would your wife want to look over your petitions? A. Because she was collecting other signatures, I understand.

1034 Q. You understand. What do you mean by that?

A. The Civil Service Commission said I did.

Mr. Ford. I object again about talking about his wife.

The Court. He has introduced it himself, sir.

By Mr. Kelley:

Q. Didn't you know then that she was?

Mr. Ford. I object. Do you mean his wife?

Mr. Kelley. Yes, I do.

Mr. Ford. I object.

The Court. In the light of the question before that, he may answer it.

Mr. Kelley. The witness has brought me back to his wife with these petitions in evidence.

By Mr. Kelley:

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Q. Didn't you know then that your wife was circulating Communist Party petitions? A. Yes, sir, I think I did.

Q. Why do you say you think you did? A. Because it is very difficult, unless there is a specific reason to remember a thing, a very sharp event, as for example, there was when I went to the Church of the Living God, something happened there which I will never forget in my whole life.

Q. Mr. Marzani, I will ask you again, did you know at that time, the date of these petitions, that your wife
1035 was also circulating like petitions?

Mr. Ford. I object, because it involves his wife.

The Court. You may answer the question.

The Witness. As I said, I think I did, yes. That was seven years ago.

By Mr. Kelley:

Q. That is your best answer, you think you did? A. That is right.

Q. That goes for each and every one of the three?

The Court. I don't understand that question.

Mr. Kelley. So far as where he took them when he got through. I am sorry.

The Court. I see.

The Witness. Yes, I think so.

By Mr. Kelley:

Q. They are not all notarized by the same notary public, are they? A. No. Two are by Mr. Samberg and one by some other name, a name I can't figure out.

Q. Didn't you swear to the truth of that affidavit in the presence of a notary public? A. Yes.

Q. Do you think he may have come to your home to take your oath? A. It is possible.

1036 Q. You say it is possible? A. Yes. I have no recollection of the specific thing, and since I didn't go somewhere else, the most likely thing to happen is that the man came to my house.

Q. Since you didn't go somewhere—are you being posi-

tive now that you didn't go to someplace else? A. I say, since I do not recollect going somewhere else.

Q. It is a process of elimination, is that it, that you can't remember any place else, so you must have gone home? A. Well, that is as close as I can come to it, after seven years.

Q. What is the name of the other notary public? A. There is no stamp with his name and the handwriting seems to be Max Kitsa or Kitses.

Q. Did you ever hear of Max Kitses? A. The name doesn't strike a chord, sir.

Q. Doesn't strike a what? A. Doesn't strike a chord of reminiscence.

Q. Now, if you circulated more petitions other than those, it is your testimony that you would have brought those home too? A. Since I don't recollect doing it, I don't know what I would have done.

Q. Did you get paid for that? A. I don't remember that either.

1037 Q. You might have? A. It is possible. It was one of the standard things on the East Side, collections for Democrats and Republicans; would pay people to collect signatures.

Q. Standard for the Communists too, was it? A. That I don't know, sir. I am not that familiar with them.

Q. You do know about the others, but you don't know about the Communists? A. No, I know that in general it was done.

Q. Now, do you recall going back to Government's Exhibit 33-X-3, 2, and 1, referring particularly to X-1, you did acknowledge an acquaintanceship with that pamphlet? A. Yes, sir. I acknowledged doing it, and being responsible for it.

Q. And you recall the testimony, do you, of Detective Drew, that each of the three exhibits that I have named were delivered by you to the home of Mary Fernandez in his presence? A. Yes, sir.

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Q. You recall at least his testimony to that effect? A. Vaguely, yes.

Q. And to the second one, you also admit an acquaintance; is that correct? A. I said I was responsible for it.

Q. And to the third one, you deny having ever
1038 seen that one; is that it? A. I don't remember seeing this at all.

Q. And that is "Rally to Free Earl Browder. Come to Madison Square Garden, Monday, September 29."

Did you attend the rally? A. I can't recall, sir. September 29—Monday? I don't know; I may very well have been in school.

Q. You might have been there? A. Well, I had one course which I have been trying to—I am confused about. It was either Monday or Tuesday night, 6 to 8.

Q. And the sole basis that you judge that you wouldn't be there is because you might have been in school? A. Oh, no, sir. But if I had been, that would settle that point.

Q. So you don't know whether you were, and you may have been; is that it? A. I may have been.

Q. Now look at the name of the petitioners on Government's Exhibit 34-A.

The first one is whom? A. It says "Leonard Guline."

Q. Do you know him? A. I don't recall, sir. I don't remember his name at all.

1039 Q. Who is the next one? A. Ross something. "Spatola."

Q. You swore down here that you knew him, didn't you? A. Yes, and I certainly did at the time.

Q. These people lived at 531 East 13th; is that right? A. That is correct.

Q. All of them A. Well, this one is either 13 or 14.

Q. It is 14.

Referring to Government's 34-B, two signatures; one on an address of 337 10th. That is about how far from your house? A. Four, five, or six blocks. Somewhere in there. I don't know where the cross section is.

Q. 236 Avenue A; how far would that be from your house? A. Avenue A was two blocks over, and it might have been a dozen blocks, one way or the other. I don't know where 236 is. In other words, Avenue A cuts this way and 6th Street is this way (indicating). It would be two blocks that way and wherever the street number would be, up or down.

Q. Look over all of the names of the signers on the petitions that you circulated and tell us whether you know any of them. A. I don't recognize any, sir.

1040 Q. But it is your testimony that you knew them at the time? A. Obviously if I put their names down.

Q. How many of them are there? A. Two, four, seven; nine. I am sorry—nine.

Q. And you have forgotten now? A. Well, I probably just met them five or ten minutes.

Q. Why do you say that? A. Well, I go up and see them and get a signature.

Q. You told me you didn't remember anything about how you circulated them. How do you know, if you stayed ten minutes or an hour? A. Maybe an hour, maybe two hours, but it is not likely that I would stay and sit an hour for somebody. It just isn't probable; that is all.

Q. Why? You knew them. A. Maybe it was two hours, if you put it that way, sure. I am trying to remember what would be most likely, under the circumstances.

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1054 *Carl Aldo Marzani,*

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Cross-Examination—Resumed

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1075 Q. Among the occasions that you visited Communist Party Section Headquarters in 44 Avenue C, were you present at a time when a lady known as Edith Charles presided at a meeting and made a talk? A. I am not sure I know who the lady is, sir.

Q. Were you ever present at that place when your wife made a talk? A. No, sir.

1076 Q. Have you ever known your wife to use the name "Edith Charles" in the Communist Party? A. Not to my knowledge, sir.

Q. Did you know her to be a member of the Party?

Mr. Ford. I object as being immaterial whether his wife is or is not.

Mr. Kelley. He testified yesterday he would go there to meet her, and any connection therewith I think is proper to be shown.

The Court. He may answer.

The Witness. Yes, sir; she was.

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Q. Were you ever present at a meeting in New York where the sheet marked Government's 33-A-1, or a facsimile, were distributed to you or to others in your presence? A. No, sir.

• • • •

Mr. Kelley.

Your Honor, this is an exhibit identified and received in evidence at the time Detective Drew testified. I would like to read it to the jury.

1077 It was temporarily received at that time, you recall.

The Court. Very well.

Mr. Kelley. It is entitled "Parade for Peace."

"Mobilize at 7th Street and Avenue A.

March to rally at Rutger's Square.

Keep the U. S. out of war.

Defeat compulsory military conscription.

Protect the foreign-born. Protest anti-alien bill.

Pass the American Youth Act. Jobs for the unemployed.

Defend democracy in America."

I am not reading it all.

"Sponsored by the East Side Youth Conference and Lower East side Peace Committee, Thursday, July 25."

By Mr. Kelley:

Q. Referring to Government's Exhibit 33-A-2, were you ever at a meeting in New York where this document or a facsimile was distributed to you or to others in your vicinity and presence (handing exhibit to witness)? A. No, sir; I don't recollect this document at all.

Mr. Kelley. If your Honor please, this is a similar document identified by the detective.

The Court. Very well.

Mr. Kelley. Entitled "Makings of a Frame-up."

An editorial from the Daily Worker, New York, Friday, July 12, 1940.

1078 At the bottom, "Read the Daily worker

New York State Committee Communist Party.

New York State Young Communists League, 35 East 12th Street, New York City."

By Mr. Kelley:

Q. Were you ever in the premises located at 35 East 12th Street, New York City?

• • • •

1079 A. I don't recall the specific address, sir, because as I understand, according to the testimony of Mr. Hewitt there, recently, there were two entrances to this building, but there was a building there, and I was there, in there.

Q. Did you know it to be the State Headquarters of the Communist Party? A. I knew it was Communist Party. I don't know state, or so on. But I was in a bookshop. I stopped there to get books I couldn't get elsewhere.

Q. But you did not know much about it? A. No.

Q. What were you doing there? A. I said to get books, books that I couldn't get elsewhere, particularly books from England.

Q. I show you what has been marked Government's Exhibit 33-A-3, and ask whether this document or a facsimile was ever distributed in your presence or to you at any meeting you ever attended in New York City (handing exhibit to witness)? A. I don't recall this document, sir.

Mr. Kelley. Again, ladies and gentlemen of the jury, I am just reading the top and the bottom. Others will be available to you.

It is entitled "Why was the Christian Front Given a Green Light?"

1080 At the bottom, in larger letters, appears "National Council of Jewish Communists, Communist Party, U.S.A., 35 East 12th Street, New York City."

And at the extreme bottom: "Read the Daily Worker and the Morning Free Light. Vote Communist in November Elections."

• • • •

Q. Among the occasions that you were present in the Communist Party Section Headquarters at 44 Avenue C, in New York, did you ever lecture on the principles of Communism, White Chauvism? A. No, sir.

Q. You say you did know Bob Appel well? A. I knew him.

Q. Did you see him frequently? A. Occasionally.

Q. Would you say he was notoriously known as the Communist Party leader of that area? A. Yes, sir.

Q. Anyone living there would necessarily know of him in that respect? A. Very likely; yes, sir.

• • • •

1081 The Court. Where did you know him?

The Witness. On the East Side. The headquarters was three blocks away from my house, sir.

By Mr. Kelley:

Q. Were you ever at 44 Avenue C when the Communist Bob Appel was there? A. Yes.

Q. Were you ever there at a time when a discussion was had concerning a march on Times Square? A. Not that I recall, sir.

Q. Did you make a speech on 14th Street and Avenue A on August 9, 1940, speaking in Italian in opposition to conscription? A. I never spoke in opposition to conscription, sir.

Q. Did anyone ever turn in to you a Communist Party book—membership book? A. Not that I recall.

1082 Q. You deny ever receiving from a Negro named Bill Easley a Communist Party Book? A. I don't remember a Negro named Bill Easley, sir.

Q. Did you ever see a Communist Party book? A. Not that I remember.

Q. Did you ever see your wife's? A. No; I know——

Mr. Ford. Wait a minute. I object. His wife is not on trial.

The Court. He has answered it, sir.

By Mr. Kelley:

Q. Were you ever present in the Section Communist Party Headquarters at 44 Avenue C when your friend, Sema Sverdlove, was also there? A. Yes, sir.

Q. On more than one occasion? A. A couple of times.

Q. Was her husband there too? A. No, sir.

Q. You never saw him? A. Not there; no, sir.

Q. Did you ever see him in the State Headquarters of the Communist Party? A. I was never there, sir, that I can recall.

Q. Were you ever at any other headquarters of the Communist Party other than 44 Avenue C? A.

1083 Not that I know myself, no, sir; not that I recall.

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Q. Did you ever, at 44 Avenue C, or at any other place, urge people to attend a meeting known as "Peace Mobilization"? A. No, sir.

Q. Were you ever present at 44 Avenue C or any place else on an occasion when Bob Appel informed others present that that was control week and that all members would have to turn in their books? A. I recall no such occasion, sir.

Q. You what? A. I recall no such occasion.

Q. Did you ever make a speech from a stepladder with reference to conscription? A. I never spoke on conscription, sir.

Q. Were you ever present at a street meeting where your wife spoke on the subject? A. Not that I remember.

Mr. Ford. I object to that as involving his wife, and she is not on trial.

The Court. It is not a question of his wife being on trial. It is a question of whether he was attending this meeting, sir.

1084 By Mr. Kelley:

Q. What was your answer? A. Not that I remember.

Q. Is your answer the same with respect to a Sid Weinstock? A. Yes. I never heard the name.

Q. Did you ever address a meeting at 44 Avenue C in the course of which you recommended to anyone present there that two members should be expelled for failure to participate in activities? A. I never spoke at a meeting at 44 Avenue C, sir.

Q. Did you ever know a person named Clem DiGracia at 44 Avenue C? A. No, sir; the name is not familiar.

Q. Did you ever at any time or place in New York City make a lecture or talk on a subject of history of the Communist Party Soviet Uuion? A. Never a lecture, sir. I may have talked about it.

Q. I mean to a group of people. A. Oh, no, sir.

Q. Did you ever make the statement, following the pas-

sage of the Conscription Act, that members of the Communist Party should endeavor, when they entered the Army, to recruit Communists from the ranks? A. No, sir. As I explained before, I have been a member of the armed services.

1085 Q. Did you or didn't you? A. No, sir.

Mr. Ford. Your Honor, may he be permitted to explain his answer?

The Court. I think that is a complete answer.

Mr. Ford. May I have an exception?

The Court. Certainly.

By Mr. Kelley:

Q. Did you ever express the hope the Communist Party would gain control of the Army? A. No, sir.

Q. Did you ever make a statement to the effect that such a plan or purpose as I have just mentioned should be kept in secrecy among the members of the Communist Party? A. No, sir.

Q. Did you ever attend the Communist Party Workers School? A. Not as I recall, sir.

Q. Did you know of it? A. Oh, yes, sir.

Q. Did you ever urge anyone to picket the premises of Congressman Edelstein in opposition to the passage of any bill? A. I don't recall, sir. There was discussion one time of picketing in regards to the anti-strike bill, but I don't recall if I specifically urged to picket the

1086 Congressman or not.

Q. The anti-strike bill was before Congress prior to June 22, of 1941, wasn't it? A. I have no recollection. I think it was, sir.

Q. After June 22, 1941, did you ever urge that no strikes should be undertaken? A. I have always urged the right to strike to maintain certain——

Q. Just a moment. I want you to answer my question. A. I don't recollect urging that no strikes be undertaken, sir.

• • • •

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Q. Now, you have stated that there were occasions when you saw Sema Sverdlove, whom you have stated to be along with her husband, an intimate friend.

• • • •

1087 Q. And I will ask you whether on one of the occaisons you saw her at the Communist Section Headquarters you participated with her in folding, sorting, or otherwise handling of leaflets? A. Not that I recall, sir.

Q. Or in a discussion of the moving picture "The Great Dictator" with her at that place? A. I don't recall that either, I am sorry to say.

Q. Did you ever make the statement to anyone, while you were at 44 Avenue C, that you were responsible for your wife becoming a Communist? A. Oh, no, sir.

Mr. Ford. Wait a minute. I object to that as again injecting his wife into the case.

May I have an exception?

Mr. Kelley. The testimony is in the record.

The Court. He has answered the question, Mr. Ford, as your witness has done repeatedly, sir, before the question is completed.

The Witness. I am sorry. I am certainly going to watch that.

Mr. Ford. At this time I am going to advise the
1088 Government that I will object to any question involving his wife.

Mr. Kelley. Now, if the Court please,—

The Court. I will not rule on it at the present time, sir, but as the question is put.

Mr. Kelley. All right, sir.

By Mr. Kelley:

Q. Did you ever attend a meeting in the home of Joseph Lopez, located at 220 Avenue A, Apartment 6, rear of the house? A. No, sir.

Q. Do you know such a person? A. I don't recollect such a name.

Q. Did you know a person named Joseph Fernandez Lopez? A. No.

Q. Did you ever distribute tickets at any meeting to the Soviet film entiled "The Great Beginning"? A. Not that I recollect, sir.

Q. You might have? A. I don't think so.

Q. You don't think so?

Did you ever make a report to anyone concerning sales of the Daily or Sunday Worker? A. No, sir.

Q. Do you admit or deny having anything to do with the sales of the Daily or Sunday Worker? A.
1089 Sometimes I would walk with my wife when she had a couple of the Sunday or Daily Workers, and sometimes she sold them, but I don't remember the specific dates, circumstances, or anything of that sort. I know that she did do it.

Q. But you never made a report on the sales? A. Not that I remember; no.

Q. Did you ever announce to anybody that a group with which you were connected was in competition with some other group in connection with sales of the Daily Worker? A. No, sir.

Q. Did you ever make the statement to anyone in 44 Avenue C, by way of announcing a public meeting to be sponsored by the Tompkins Square Peace Council, an affiliate of the American Peace Mobilization? A. No, sir.

Q. I show you what has been marked in evidence Exhibit 33-N-1.

Were you ever at a meeting in New York where this document or a facsimile was distributed either to you or to other people in your presence?

• • • •

1090 A. Since I don't recollect the document, sir, I can't recollect the meeting.

• • • •

PLEASE THROUGH - POOR COPY

1091 Q. I show you what has been marked Government's Exhibit 33-N-2 and ask you whether or not you ever attended a meeting at which that document or a facsimile was distributed in your presence or to you. A. Not that I recollect, sir.

Mr. Kelley. If the Court please, as to each of these exhibits, I would like to read a portion to the jury.

The Court. Very well, sir.

Mr. Kelley. Reading now from 33-N-2, on the fly leaf are the words:

"Are You Prepared?"

And on the lower part of the back, "American Peace Mobilization, New York Council, 381 Fourth Avenue, New York City."

By Mr. Kelley:

Q. How far did you live from 381 Fourth Avenue, New York City? A. I don't know where 381 is, sir, but I lived about five or six or more, I guess seven blocks to Fourth Avenue, and 381, whether it was uptown or downtown——

Q. You haven't any idea? A. No. I know that the lower hundreds are sort of below 42nd Street, but I don't know what street they are at.

Mr. Kelley. And in connection with Government's Exhibit 33-N-1, it says:

1092 "Women of the East Side, how can you protect your families under the Draft Law?"

"Men of the East Side, what exemptions can you claim under the Draft Law?"

"People of the East Side, what can you do to keep America at peace?"

"Questions on the draft answered at a public meeting at Hennington Hall, 214 East 2nd Street, Thursday, December 12, at 8 p. m."

Down at the bottom it says:

"Sponsored by the Tompkins Square Peace Council."

By Mr. Kelley:

Q. Were you ever in Hennington Hall? A. There were a lot of halls on the East Side. I may have been in that one. There were dances regularly, sir.

Q. Speaking of dances, did you attend a social affair at 143 Suffolk Street which was put on by the East Side Branch of the National Negro Congress? A. I have a recollection, sir——

Q. Did you attend such a meeting or dance? A. I think I did attend a dance. I don't know whether——

Q. Were you there introduced to a Negro by the name of Bill Easley, and were you introduced then by the name "Tony Whales"? A. I don't recollect a Negro
1093 Bill Easley, and I never used the name "Tony Whales."

Q. Did anyone there introduce you there at that time by the name "Tony Whales"? A. Not that I know, sir.

Q. Did you know a person named "Harry Daniels"? A. The name is not familiar, sir. I don't recollect it.

Q. Were you aware at the time of the fact that the 6th A. D. Communist Party Section changed its headquarters from 44 Avenue C to a place located as 67 Clinton Street? A. I don't recall hearing about it, sir.

Q. Did you ever know a Negro by the name of Bill Johnson? A. No, sir.

• • • •

Q. I show you what has been marked Government's Exhibit 33-R-1 and ask you whether or not that document or a facsimile was ever distributed in your presence or to you. A. Not that I recall, sir. I don't recall the document either.

Q. Did you ever attend any mass rallies advertised for the purpose of freeing Earl Browder? A. I
1094 don't recall. I may have.

Q. In connection with your views concerning Earl Browder, did you believe what is stated at the top of this exhibit?

• • • •

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Did you believe that the ruling against Browder was a war-dictatorship move? A. Oh, no, sir. I thought it was a civil liberties affair.

Mr. Kelley. May it please the Court, I would like to read some additional matter that I have not referred to the jury.

The Court. Very well.

Mr. Kelley. At the bottom of R-1, the notation,

"Issued by the New York State Committee Communist Party, 35 East 12th Street, New York City."

"Read the Daily and Sunday Worker."

By Mr. Kelley:

Q. Now, as to Government's Exhibit 33-T-1, was that document or a facsimile ever distributed to you or to others in your presence? A. Not that I recall, sir.

1095 I don't recollect the document.

Mr. Kelley. And this one recites at the top:

"Call American People's Committee, New York City, April 5-6, 1941."

"To all friends of peace and liberty."

On the back is a registration blank and an endorser's blank.

"Please mail immediately to the national office, American Peace Mobilization, 1133 Broadway, New York City."

By Mr. Kelley:

Q. Do I understand it to be your testimony that until some time in connection with the trial of this case you never knew or saw Detective Archer Drew? A. I have been trying to recollect him, and I can't place him, sir.

Q. And is your answer the same as to George Hewitt? A. That is correct, sir.

• • • •

1117 The Court. Ladies and gentlemen, in the interval it has been stipulated and agreed by counsel for the defendant and counsel for the Government that Mr. Mar-

zani's testimony, insofar as the Tokyo situation is concerned, may be understood as follows:

That the defendant was requested to prepare and did prepare certain maps and data relating to aerial targets in Tokyo, but it is not contended by the defendant that the targets chosen were bombed by Doolittle's flyers. They may or may not have been bombed by the flyers.

• • • •

1124 Mr. Ford. Now, in general, I would like your Honor to instruct the jury in substance in the following matters:

Discussion of Prayers

• • • •

1125 Mr. Ford. Three, charge the jury in substance on the following topic: that if they find from the evidence that the defendant only knew some members of the Communist Party and associated with them, that that is not enough on which to predicate a finding of guilt on the charges of the indictment.

1126 Four, that if the jury finds from the evidence that the defendant visited places where Communists had their offices, they cannot from this fact alone infer that he was a member of the Communist Party or engaged in any activities therefor or contributed therefor.

Five, if the jury believes from the evidence that the defendant participated in meetings of the National Negro Congress, and the East Side Conference to Defend America—Crush Hitler, and spoke thereat, and distributed leaflets thereat, even though Communists may have been present thereat, they must find him not guilty.

• • • •

1133 Mr. Kelley. As point 3 for instructions, hastily stated it is my understanding that the defendant

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urges an instruction to the effect that if the jury found that the defendant knew certain or some members of the Communist Party and associated with them, those facts

1134 alone would not be sufficient to warrant a conviction.

I lump with that the next point, that if they found he visited Communist Party offices, that fact alone would not be sufficient, and the following point that if they found he participated in activities of the National Negro Congress, etc.

Those three requests fall into the category of those very frequently condemned by the courts, in asking a trial judge to select specific items and say, "This alone would not be sufficient." The true rule, as enunciated from time immemorial, the rule that is held adequate and sufficient is to charge the jury that upon all the evidence they must find, and so forth. It is prejudicial to do it otherwise because is casts upon such selected items intemperate inferences and possibly could lead to the conclusion that the judge himself finds it of no probative value.

• • • •

1146 The Court. What I usually have done is to take the affirmative rather than the negative of these, and make the necessary ingredients—proof beyond a reasonable doubt—the test, with a statement to the effect that if the Government fails to sustain its burden as to each of the material elements, then of course their verdict must be not guilty, rather than taking the negative.

But I will consider everything that you have here.

EXHIBITS

Govt 20
Washington, D. C.
July 29, 1942

Statement of CARL ALDO MARZANI made in the presence of Special Agent R. F. RYAN and stenographer KATHLEEN LOFTUS of the Federal Bureau of Investigation.

Questions by Agent RYAN:

Q. The Federal Bureau of Investigation was empowered by the 77th Congress of the United States, under Public Law 135, to investigate the employees of the Federal Government who are alleged members of subversive organizations, or who advocate the overthrow of the Federal Government, and make a report to Congress. The purpose of this interview is to allow you an opportunity to answer questions concerning information which has been received by the FBI about alleged activities on your part. The questions I am about to ask you may be answered, if you so desire, and you will be given an opportunity to make any statement of your own which you feel will fairly present your side of the question. A copy of the report of the investigation, incorporating your statement, will be furnished to the agency which employs you. Do you have any objection to making this statement under oath? A. No. Will I be furnished a copy of the transcript?

Q. Yes, you may have a copy.

Would you raise your right hand, please. Do you solenly swear that you will tell the truth, the whole truth and nothing but the truth, so help you God? A. I do.

Q. Will you state your full name, please. A. Carl Aldo Marzani.

Q. Where do you live? A. Vienna, Virginia.

Q. Where are you employed? A. Office of Strategic Services.

Q. In what capacity? A. Economic Editor.

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Q. Mr. Marzani, are you now or have you ever been a member of the Communist Party? A. No.

Q. Have you ever attended any meetings of the Communist Party? A. No.

Q. Have you ever contributed any money to the Communist Party? A. No.

Q. Have you ever contributed any services to the Communist Party? A. No.

Q. Have you ever participated in any of the activities of the Communist Party? A. No.

Q. Have you ever signed any Communist Party election petitions? A. Yes.

Q. When and where did you sign those petitions? A. A couple of years ago, perhaps.

Q. Where did you sign the petitions? A. In New York.

Q. What were the circumstances of your signing those petitions? A. Oh, I don't recall—the petitions went around and it was signed. I guess someone came to the house.

Q. Did you know what you were signing? A. Yes, I signed the petition presented to me for the purpose of running Earl Browder as a Congressman at the time when, I believe, it was presented to me as a defense of civil liberties, as Mr. Browder had been given an unduly long sentence.

Q. Have you ever lived at 643 East 6th Street, New York City? A. Yes.

Q. At this time, you may have the opportunity of making any statement of your own which you think is pertinent to this inquiry. A. I have none.

Q. Mr. Marzani, would you care to return to read and sign the statement? A. I don't think that will be necessary.

January 15, 1947

I hereby certify that the above and foregoing interrogation, consisting of three pages, is a correct transcription

of the stenographic notes taken by me during the interrogation of CARL ALDO MARZANI by SPECIAL AGENT R. F. RYAN, Federal Bureau of Investigation, on January 29, 1942, at Washington, D. C., save and except that the last question and answer appearing on the third page thereof were not noted in shorthand but were added to the transcription in keeping with regulations and customs then in force.

KATHLEEN (LOFTUS) NIXON

• • • •

160 *Exhibit 22*

"Report of Special Hearing

Carl Aldo Marzani, c/o Mr. Hugh C. Barton, Route #3, Vienna, Virginia.

Applicant for the position of Economic Editor, Office of Coordinator of Information (Investigation at their request), E. O. 8564.

Special hearing conducted November 23, 1942, in room 517 Mather Building.

Special hearing conducted by Charles N. Keating, Sr., Investigator.

Witnessed by: John H. Finlator, Jr. Investigator

Stenographer: Selma S. Newman.

Mr. Keating: In the course of investigation as to your character and qualifications for the position of Economic Editor, a number of matters were revealed which were either discrepant, or misleading or which might reflect on your character, loyalty or qualifications for em-

161 ployment in this position.

It is an established policy of the United States Civil Service Commission that these matters be brought to your attention, affording you opportunity to present such answers or explanations you wish to make. Such answers or explanations will be included as a part of the report made on your case so that the Commission will have them for consideration in arriving at a decision.

I should like to present these matters to you at this time. It is the practice of the Commission to receive your statement or explanation under oath. Do you have any objection to taking an oath? A. No.

(Whereupon,

CARL ALDO MARZANI

was duly sworn and stated as follows:)

Q. What is your full name and present address? A. Carl Aldo Marzani, Vienna, Virginia.

• • • •

183 Q. Are you now or have you been a member of the Communist Party? A. No.

Q. Have you ever attended meetings of the Communist Party? A. I don't think so.

Q. Have you ever belonged to any organization which was affiliated with the Communist Party? A. No.

Q. Have you ever used the name of Tony Whales? A. No.

Q. Have you ever used a name similar to that? A. No.

Q. Has your wife ever used the name of Edith Charles? A. No, as far as I know.

Q. The Commission has received information to the effect that you were a section organizer for the Communist Party on the East Side in New York City under the name of Tony Whales. What comment do you have to

184 make? A. The answer is no.

Q. The Commission has received information to the effect that you made speeches against the conscription bill, is that information correct? A. No.

Q. Have you ever signed a nominating petition for the Communist Party? A. I could have. Yes, I think I could have.

Q. Well, have you? A. Well, the answer I give you is, the FBI brought to my attention the fact that they thought

I had, I couldn't recall, but I don't recall any specific instance, it could be yes.

Q. (Handing a photostat copy of a Communist nominating petition to Mr. Marzani). I will hand you Exhibit A which is a photostatic copy of a nominating petition for the Communist Party to which your name is purportedly signed on January 19, 1940, and I will ask you if that is your signature. A. Yes, it is.

Q. Do you now recall signing it? A. I don't recall—well, yes, I do, as a matter of fact, now that I see the date.

It was early 1940, I don't remember the day, but I
185 remember there was occasion to sign the petition at that time.

Q. What were the circumstances surrounding this petition being presented to you for signature? A. I think it was a campaign to elect Mr. Browder."

Mr. Ford. Then there is a "g".

Mr. Kelley. The last sheet.

Mr. Ford. I will read the complete answer:

"I think it was a campaign to elect Mr. Browder. In fact, I recollect the occasion now. Mr. Browder had just been sentenced to what I considered an unduly harsh sentence in view of the offense committed. It seemed to me a clear case of civil liberties. I may add that the sentence was later commuted by Presidential order, I believe on grounds of undue harshness."

Mr. Kelley. At the top of page 14, now:

"Q. You were aware of that at the time, were you? A. Yes.

Q. Did you read the petition before signing it? A. Not too carefully, but I knew what I was signing.

Q. Among other things contained in that petition is the statement that you intend to support the candidates of the Communist Party. Did you intend at the time to give active support to the Communist Party candidates? A. I don't recall my intentions at the moment. I—what

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I meant to accomplish by signing my name was to
186 nominate them.

Q. Have you signed any other Communist petitions? A. Not that I can recollect.

• • • •

Government Exhibit No. 30

Govt 30 (2 pages)

BOARD OF APPEALS AND REVIEW

Hearing in the case of

MR. CARL ALDO MARZANI

held on

April 20, 1943

• • • •

After having been first duly sworn, Carl Aldo Marzani, on April 20, 1943, in the City of Washington, District of Columbia, in response to the following questions propounded by J. F. Edwards, Chairman, Board of Appeals and Review, Civil Service Commission, made the following answers:

• • • •

Mr. Edwards: The statement is made here that "Mr. Marzani is known with the Communist Party as Tony Whales". Anybody ever call you "Tony"?

Mr. Marzani: Not Tony Whales—Tony, probably. I have never heard that name, sir. After the thing was asked me at the interview I chewed it over quite a bit. I said—I wonder where the basis for that sort of thing came from. And the use of the name "Tony", I probably have been called "Tony"—not because it is my name but because it is a very common Italian name. I have been

called lots of names. I have wondered if there is a Communist who is known as Tony Whales and if somebody upon hearing me being called "Tony" may have attached some significance—but I don't know.

Mr. Edwards: The next thing is that you made speeches against the Conscription bill.

Mr. Marzani: What can I do except say that it is absolutely false.

Mr. Edwards: So your statement is that you never opposed the Selective Service legislation when it was in Congress?

Mr. Marzani: That is right.

• • • •

1 Govt 30a (5 pages)

Government Exhibit 30a

Portions of the Testimony of the Defendant Carl Aldo Marzani Given at a Hearing Before the Board of Appeals and Review, Civil Service Commission on April 20, 1943, Washington, D. C.

• • • •

(Part of Question by Mr. Edwards appearing on Page 30.)

Mr. Edwards: "• • • You signed a Communist nominating petition apparently in January 1940. That was while you were at W. P. A., I judge.

Mr. Marzani: Yes, sir.

(Question by Mr. Edwards appearing on Page 30.)

Mr. Edwards: And, of course, that petition was in favor of Earl Browder who was at that time candidate for President, I believe. You might just give us your reason why you would sign a nominating petition for a Communist candidate.

Mr. Marzani: As you probably know, they were canvassing from door to door asking people to sign petitions.

I signed it knowing quite well what I was doing and the reasons were those which were adduced by the people canvassing. Primarily, it was found out that Browder had been sentenced to jail for four years on the basis that his passport had not been properly made out. It was pointed out to me that the sentence was unduly harsh for the offense. The person who came around had lists showing what similar penalties for similar offenses were, and so-on. The thing was presented to me on an issue of a civil liberty and the opportunity of Mr. Browder—his case was on appeal at that time to the Supreme Court which disallowed the charge, or disallowed the appeal, and it was pointed out if he was nominated—if he could get on a ballot—it would have a substantial effect on this and I signed primarily for that reason.

(Question by Mr. Edwards appearing on Page 33.)

Mr. Edwards: In addition to the signing of the nominating petition for Mr. Browder, our record indicates that you solicited other signers—I think. At least three, the record says. Do you recall that?

Mr. Marzani: No, sir. And what is the nature of the record may I ask?

Mr. Edwards: The statement is: "Mr. Marzani signed a Communist petition on January 19, 1940, and official records indicate that he was a witness to three other Communist petitions. Being a witness to a Communist petition implies having solicited others to sign the petition." Remember being a witness?

Mr. Marzani: No, I don't.

Mr. Edwards: The only statement here that I see is that the official records indicate that. I don't seem to have the documents, as we do in the case of signing the petition, that you were a witness to the others, just as Mr. Cooper was a witness to the one that you signed. You don't have any recollection of having solicited others to sign petitions?

Mr. Marzani: No, I haven't.

Mr. Edwards: Nor witnessing any other petitions?

Mr. Marzani: Not to my recollection.

(Question of Mr. Edwards appearing on Page 34.)

Mr. Edwards: At the same time you were on W. P. A., your wife was there, and I believe they subsequently suspended or dismissed her because of her activities in securing signers to Communist nominating petitions. Of course, that is not something we are charging up to you except under the general sense of some one being very close to you being engaged in that kind of activity. Were you aware of her activities in this connection?

Mr. Marzani: I knew that she had done this, sir.

(Question of Mr. Edwards appearing on Page 34.)

Mr. Edwards: Did you encourage her in procuring signatures, discourage her, or remain absolutely neutral?

Mr. Marzani: My wife is a person of very well defined personality, you might say, and I remained neutral. It is my impression she was paid for getting signatures, which, incidentally, is a practice followed by the Democratic and Republican Parties on the East Side, and, I imagine, elsewhere.

(Question of Mr. Edwards appearing on Page 34.)

Mr. Edwards: Yes, I suppose she was paid a certain amount. I don't know what but, but of course, the inference there would be whether, if you were willing for her to work for pay in order to advance the cause of the Party which was considered inimical to the Government, you wolud be just as blameworthy.

Mr. Marzani: May I point out—there is where I always get into trouble because I have some very strong feelings. I really do. I mean, I am being as fair and open as I can. I think the Communists, or the Fascists, or anybody with an idea, should be on the ballot and if the people don't like them they can vote them down. In England, you know, the practice is that anybody can be a candidate for office simply by putting up $100, or something

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like that. Now, we are getting into political theory here. I felt that all very strongly and, you know, I can only honestly say it has no real significance to any particular party. Now, there it is.

4 (Question of Mr. Edwards appearing on page 34.)

Mr. Edwards: You would admit that you had helped the party that you thought was inimical to our form of Government, wouldn't you?

Mr. Marzani: No, I would not, and I don't consider it help to the Party. I consider it help to the system of American form of Government. I said so by signing a petition for Browder. I wasn't kidding about that either or making it up. The fact remains that—you know—democracy has nothing to fear from anybody except from itself. If we are afraid, if we have to give Mr. Browder four years, if we can't get him for anything else other than signing the wrong passport, then something is wrong. The President of the United States pardoned him after a certain amount of time and on the basis—strictly on the nature of the sentenec that as such it was contrary to democratic interests. I think that is true and we always come back upon that matter, you know. Garfield Hays, head of Civil Liberties, inferred that in some famous case and was violently attacked. He said, "I don't want to have anything to do with Fascists, I have no sympathies with them, and I think Fascism should not be allowed to grow, but", he said, "if we want to get the Fascists because we think they are wrong, let's get them for a specific reason." I think it is ethically wrong to get Al Capone because he didn't pay his income tax. If the laws have loop holes, let's correct them. Let's get him for what he was doing. Now, you see, we are reaching—what shall I say—an ultimatum series of beliefs. The only thing I can say is that I think I am democratic.

Mr. Edwards: Well, you might not be in agreement on the opinion of Al Capone.

Mr. Marzani: I want him in jail—don't misunderstand me. I want him in jail permanently, but let's put him in for what he did—not income tax evasion.

• • • •

Stipulation

It is hereby stipulated by and between counsel for the defendant and counsel of record for the government in this case that in requesting instructions, defendant asked the Court to charge the jury as respects character evidence in accordance with the principles enunciated in the case of *Egan v. U. S.* 52 A. D. C. 958, 287 F 968 (1923).

ALLAN R. ROSENBERG,
Counsel for the Defendant

JOHN M. KELLEY, JR.,
Special Assistant to the Attorney General of the United States

September 4, 1947

• • • •

401 GEORGE HEWITT

was called as a witness for and on behalf of the United States.

DIRECT EXAMINATION

By Mr. Kelley:

Q. State your full name. A. George Hewitt.

Q. Will you state your age. A. I am 41 years old.

• • • •

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Q. Are you presently a member of the Communist Party? A. No, I am not.

Q. Were you ever a member of the Communist Party? A. I have been a member for 18 years.

Q. Starting when? A. About 1927.

402 Q. When did you cease to be a member of the Party? A. About 1944.

Q. While you were a member of the Communist Party did you make a trip to Russia? A. I did.

Q. What did you do there? A. I was sent there——

• • • •

A. I was sent to the Soviet Union in the year of 1930 where I remained—I was supposed to stay there four years, but the course was cut in two.

I was sent to the International Lenin School, in which I met about 40 other Negro students and about 60 other white students from the United States.

The purpose of the journey to Russia to this school was to indoctrinate us with the definite purpose of learning espionage; to become professional revolutionists; to learn theory that would ultimately lead to the overthrow of the United States Government.

403 Q. How long did you remain in Moscow? A. I was there two years; a little over.

Q. Will you fix the date as closely as you can of your return to this country? A. That was about 1933, or the latter part of 1932.

Q. On your return to this country, what was your gainful livelihood? A. I at first was asked to go to the State of Louisiana as an organizer.

Mr. Ford. I object to this as all being irrelevant.

Mr. Kelley. The Government is laying a predicate, your Honor, which I will tie up and establish in connection with the defendant and his knowledge of the defendant.

The Court. I will allow it.

Mr. Ford. May I have an exception?

• • • •

Q. What was your gainful occupation upon your return to the United States from Russia? A. I was asked by the national officials of the Communist Party to go
404 to the State of Louisiana as what they call a district organizer.

Q. From what source did you receive funds upon which you lived? A. From the Communist Party.

• • • •

Q. My question was, how long did you make your livelihood and live by virtue of money furnished you by the Communist Party? A. From the time I came back until I left.

Q. State whether or not in your capacity as a member of the Communist Party in 1940, you were a teacher at the Workers' School in New York City. A. That is right.

Q. You say your name is George Hewitt? A. I was known as Timothy Holmes.

Q. In what way were you known as Timothy Holmes and under what circumstances? A. As organizer and teacher.

Q. What is your real name? A. George Hewitt.

Q. Did you adopt the name Tim Holmes for Communist Party purposes? A. I had several names.

405 Q. Was that the purpose of that name, Tim Holmes? A. The purpose of that name was to conceal my real one.

Q. Did you teach a course in the Workers' School under the name Tim Holmes? A. I did.

Q. By whom was the Workers' School operated? A. By the Communist Party.

Q. State whether or not among the students whom you taught in 1940 at the Workers' School there was a Negro by the name of Bill Easley. A. Yes, he was a student in my class.

Q. You had a student that you knew by that name, Bill Easley? A. That is right.

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Q. Have you come to know that individual since by any other name? A. As Mr. Drew.

• • • •

Q. Did you come to know the man Drew as a detective with the New York Police Force? A. I didn't know him as a detective then, but I knew him as Beasley.

Q. Are you acquainted with the defendant in this
406 case, Carl Aldo Marzani? A. I knew Mr. Marzani as Tony Whales.

Q. Give us the time as approximately as you can and the place, when you met him, and who introduced you. A. Mr. Beasley, while a student in my class at the Workers' School, enticed me to come to his section, a part of the city known around 14th Street and Avenue C, in order to clarify the comrades on their bad development on Negro work.

That was what I specialized in, and as a result of going to this meeting that Mr. Beasley arranged, I was introduced to Mr. Tony—Mr. Whales.

Q. At the time of the introduction was anything said descriptive of Tony Whales in respect to Tony Whales' connection with the Party?

• • • •

Q. Was there a conversation connected with your introduction? A. Yes, sir.

Q. In the course of that conversation was any reference made to any office or position held by Mr. Marzani when you were introduced to him?

407 • • • •

By Mr. Kelley:

Q. All right. Relate in full the conversation you had at the time you were introduced to this defendant under the name of Tony Whales by the man Bill Easley. A. I was merely introduced to Mr. Whales and he was intro-

duced to me as the Educational Director of the section of the Communist Party.

Q. When did you first come to know this defendant by the name of Marzani?

• • • •

The Witness. Roughly about the year 1940, 1941. Possibly the latter part.

By Mr. Kelley:

Q. Of what? A. Of '40, or the beginning of '41. I am not sure about the exact date.

408 Q. Now, when did you first come to know the defendant whom you first met as Tony Whales under the name Marzani? A. In the recent newspaper clippings in New York City.

Q. By recent, you mean when?

• • • •

The Witness. No, I mean I recognized the picture of this man as Tony Whales, but it was stated he was Marzani in the papers.

That happened about six months ago, or four or five months ago, when the case first started.

By Mr. Kelley:

Q. In other words, you did not know the individual who sits at this table, to whom you were introduced under the name Tony Whales, by the name of Marzani until some time this year? A. That is right.

Q. State whether or not you ever met and talked with this defendant at the New York State Communist Party Headquarters. A. Well, in the capacity of Educational Director, I believe at that time he was pinch-hitting——

409 Mr. Ford (interposing). I object to it as not being responsive. He asked him if he ever spoke to him, and he says yes or no.

The Court. Did you speak to him, sir?

The Witness. Yes, sir.

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Mr. Ford. May we have the time, your Honor?

The Witness. At the State Headquarters of the Communist Party.

The Court. And when?

The Witness. In the process of educational work in which those organized to do educational work came to make certain reports.

The Court. Do you know the time?

The Witness. Shortly after the meeting of the center. The center was the first time, the local center.

By Mr. Kelley:

Q. What do you speak of when you refer to the center? A. The place where I spoke on this Negro question.

Q. Now, can you locate that for us in the City of New York? A. It was on Avenue C.

Q. Do you remember the number? A. The number I I don't remember, but I do know that I only spoke at three meetings in that entire neighborhood.

Q. Would you be able to point out the area where
410 you met this defendant and spoke, if you had a map of that area? A. I believe so.

• • • •

411 Mr. Kelley. Mr. Clerk, would you mark this Government's map No. 1?

• • • •

Mr. Kelley. I will just tack it on the blackboard here in view of the jury.

The Court. Very well.

• • • •

Q. Mr. Hewitt, will you take this pointer and indicate to the Court and jury as closely as you can the location of the place where you first made the acquaintance of
412 defendant?

• • • •

The Witness. I remember coming down from Fourteenth Street and went to Avenue C.

It was somewhere around in this vicinity (indicating).

• • • •

The Court. What does the map indicate, sir? You said in the vicinity of what?

The Witness. In the vicinity of this area (indicating). I see Avenue E here, but there is no Avenue C.

413 Mr. Kelley. Well, will you look at the map, please, and see all the symbols on the map?

The Witness. Well, here is Avenue C (indicating). I see Avenue C here. This is Avenue C (indicating).

• • • •

The Witness. This is Fourteenth Street here and I walked to Avenue C here in this location, and then I came down to about around here (indicating), around Eighth and Ninth.

414 By Mr. Kelley:

Q. Now, you are pointing to a juncture of what? A. Around Tenth and Avenue C, if I am not mistaken.

• • • •

Q. Would you state as accurately as you can the last time that you saw and talked with this defendant while he was still a member of the Communist Party? A. Roughly around—first with the meeting in which I was introduced; secondly,—

Mr. Ford. Wait a minute. I object. He was asked to state the last time.

The Court. Yes.

The Witness. All right; the second time and the last time was the time with the educational organizers' meeting in which they came there to be instructed.

By Mr. Kelley:

Q. Where was that meeting? A. At the State Headquarters of the Communist Party.

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Q. Where was that located? A. 35 East 12th Street.

415 *Cross-Examination*

By Mr. Ford:

Q. Give us the date. A. The day I don't remember.

Q. The date. A. Roughly 1940 or '41.

Q. What do you mean by "roughly 1940 or '41"? A. In that period of time.

Q. Can you give us the month? A. No, I don't believe I could remember the month.

Q. Can you give us the season of the year? A. Well, I think it was in the fall. I was wearing a topcoat, if I can recall.

Q. If it was in the fall, it wouldn't be the first of 1941, would it? You mean the fall of 1940 or the fall of 1941? A. No, 1940. The latter part of 1940.

Q. Have you got any idea whether it was in December, October, or November? A. It would be any one of those three months.

Q. Could it be any other month other than those three months in that same year? A. No. It was the latter part of that year.

Q. It could not be any other month. Correct? A. Yes.

416 Q. What time of day was it? A. It was usually with those organization meetings—

Q. No, wait a minute. What time of day was it that you had this meeting; this particular one? In '40 or '41, or in the fall. This is the meeting I am talking about.

The Court. Is this the first meeting?

Mr. Ford. No, your Honor; the last time he saw him.

The Witness. I would say they had meetings of that nature around——

Mr. Ford. I move that that be stricken.

The Witness. Yes, in relation to all meetings.

Mr. Ford. You Honor, I move that that be stricken out of the answer.

I am asking what the time of day was of this last meeting.

The Court. Do you know what time of day it was?

The Witness. About five to five-thirty.

By Mr. Ford:

Q. In the eevning? A. Yes, sir.

Q. Who was with you when you went to this place? Give me the names of anyone who was with you. A. Are you referring to the meeting of the State Headquarters or the meeting of the Local?

Q. I am speaking of the meeting when you said you last saw the gentleman who sits here, and which you said
417 was some time in the latter part of '40 or the beginning of '41, of the month you don't know; I am talking about that same time we have been talking about for five minutes.

• • • •

The Witness. We had men like Isadore Beacon.

By Mr. Ford:

Q. Was he with you? A. He was a member, of the state leader type.

Q. Who was with you when you went to that meeting about five-thirty? A. Isadore Beacon, Israel Ampter, Charles Crumbin, Rose Wurtis.

Those constituted the bureau of the state apparatus.

Q. And were they all with you when you went to this meeting at five-thirty, the people you have just repeated? A. They were there when I went in.

Q. My question is, who was with you when you went there? Not who was there after you got there. A. I went myself to the meeting.

Q. And where had you come from? A. From upstairs. It was in the same building.

418 Q. Had you been there all day? A. I was a full-time functionary.

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Q. My question is, were you there all day? A. In my office; yes.

Q. Now, I understood you to say that you identify this defendant by a picture you saw in the newspaper; is that right? A. That is right.

Q. Now, when was it that you saw that picture? Give me the date when you saw that picture by which you say you identify him. A. Let us see. I think it was about three months ago.

Q. Did you say before that it was about six months ago? A. Did I?

Q. Yes, when you were—— A. It could be.

Q. Wait a minute. When you were answering Mr. Kelley's questions, didn't you say to him that it was six months ago? A. It is possible I said that.

Q. Now, do you consider in your testimony here that testifying about what happened six months ago and——

The Court. He said about six months, Mr. Ford. His testimony was about that.

Mr. Ford. I understood that my question could
419 be reasonably interpreted that I am not limiting to a day counting six months ago, but the same impression six months ago and three months ago. I mean to use it the same way be used it, your Honor.

The Court. In other words, he said about six months.

By Mr. Ford:

Q. Do you consider about six months the same as three months ago? A. Not necessarily.

Q. Now, which was it? Was it three months ago or was it six months ago, and when you say you saw his picture in the paper? A. It was between the two.

Q. So it was four or five months ago, was it? A. Possibly.

Q. Therefore it wasn't about three months ago, and it wasn't about six months ago, but it was——

* * * *

420 By Mr. Ford:

Q. Now, when you say between three and six months, do you mean to say that it was not three months and it was not six months?

Mr. Kelley. Same objection.

The Court. He does not know, Mr. Ford, according
421 to his testimony. He said between three and six.

Can you fix it any closer?

The Witness. I mean at the time when this picture first appeared.

The Court. That is right, but his question is, can you fix it any closer than three or six months.

The Witness. No. I never followed the thing——

The Court. You have answered the question.

By Mr. Ford:

Q. Now, my question is, could it have been two months? A. I will have to give you the same answer, Mr. Ford.

Q. Was it yesterday? A. The same answer.

The Court. You need not answer that, sir.

* * * *

422 Q. Now, what was the name of the paper it was in? Was it a newspaper? A. It was several clippings in the World-Tele, I believe.

Q. Now, by the World-Tele, do you mean the World-Telegram of New York? A. That is right. I believe one was the American Journal.

Q. The New York Journal? A. That is right.

Q. Now, which one of those was the one that you used to identify him? The one in the Telegram or the one in the Journal? A. Well, both. The features of the man struck me when I saw both of the papers. I read both of the papers.

Q. Now, which one did you look at first? A.
423 Well, I usually look at the World before I look at the Journal.

Q. Did you see it in there first? A. I believe so, at the time.

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Q. Now, can you give us the date when it was? A. No, I have the clippings at home. I clipped them out.

Q. My question is, can you give me the date when it was? A. No, I couldn't give you the exact date.

Q. When was the first time you say you met him? A. At Avenue C in this meeting, on a Sunday, I believe.

Q. Yes. When? I am talking about the time. A. About 1940.

Q. And was there any other times other than two, either between three and six months ago and seven years ago that you have seen him, other than those two that you have identified? A. Yes, I saw him, not to speak to. I saw him passing by.

Q. On the street? A. On the street, going to the Italian Workers' Center at one time. A sort of a place where all Communists went.

Q. Did only Italian workers go there? A. Yes, but the group there was controlled completely by Communists.

424 Mr. Ford. I move that that last be stricken out as not responsive to any question asked him.

Mr. Kelley. I think it is a fair answer.

The Court. I think it is responsive.

Mr. Ford. May I have an exception?

The Court. Yes.

By Mr. Ford:

Q. Other than those two times in 1940 and three or six months ago, have you ever talked to this defendant? A. No, I have not.

Q. And from 1940, the first time you met him, until I understood you to say you were a member of the Communist Party, until 1944— A. That is right.

Q. From 1940 up to and including 1944, when you ceased to be a member, during that time had you ever talked to this defendant? A. No, sir.

Q. And were you in the City of New York during that time? A. I was.

Q. And were you active in the Communist movement during that time? A. I was.

Q. What were you doing? What was the nature
425 of your employment three or six months ago when you say you saw his picture in the paper? A. Well, I worked for, I believe the Stenotype Company, New York City.

Q. And that is what your employment was then? A. Yes, sir.

Q. And then after you saw his picture in the paper, did you go and take that picture to someone? A. No, sir.

Q. Did you have a conversation with someone about that picture? A. My wife.

Q. Anyone else? A. No, sir.

Q. And between that time up until a week ago, did you—other than your wife—talk or discuss with anyone that particular picture? A. I spoke with Mr. Kelley.

Q. When was the first time you spoke with Mr. Kelley? A. At the Grand Jury hearing, New York.

Q. When was it? A. Once again I will have to think deeply about the extent of time. Let me see. That was about three months ago, if I am not mistaken.

Q. How long was it after you had seen the pic-
426 ture that you saw Mr. Kelley? A. Well, that was about a few months.

Q. After you had seen the picture? A. That is right.

Q. During those three months had you talked to anybody other than your wife about the picture? A. Well, Mr. Waltman of the World-Telegram called my wife up in reference to it.

Q. My question is, did you talk to anyone? A. No, I didn't. I was simply asked to see Mr. Kelley, and I came to Washington here and saw him.

Q. When did you come to Washington? A. That is about three or four months ago also.

Q. And did you have the pictures with you at that time? A. No, sir.

Q. And at whose request did you come to Washington? A. Mr. Kelley.

Q. And when did you get the request from Mr. Kelley in relation to the time when you came to Washington? A. Through my wife.

• • • •

427 The Witness. Shortly before the time of the Grand Jury hearing in New York.

By Mr. Ford:

Q. Now, did you use the address 35 East 12th Street, New York City? A. There were two entrances. 35 East 12th——

Q. No, my question is, did you use that address, 35 East 12th Street, New York City? A. I did.

Q. What did you say was located at 35 East 12th Street, New York City? A. Do you want me to give you floor by floor?

428 Q. Well, is it a store or is it a building or an apartment house? A. It is a loft building that constitutes the headquarters of the Communist Party of the United States.

Q. Did you know a place at 14th and Avenue C in New York City? A. I believe that is the place I referred to in which I spoke.

Q. You spoke about what? A. In which I was invited. I believe that is the place; the headquarters of the local Communist Party, in which Mr. Marzani was the section educational director.

Mr. Ford. I move that the last is voluntary and that the conclusion be stricken out.

The Court. It is repetitious.

Mr. Ford. May it be stricken out, your Honor?

The Court. It may be stricken out because it has no useful purpose. It was previously testified to.

By Mr. Ford:

Q. Now, you said you used several names, among which

was Timothy Holmes. Is that H-o-l-m-e-s? A. H-o-l-m-e-s.

Mr. Kelley. Excuse me, counsel. Did you say seven or several?

The Court. Several.

Mr. Ford. S-e-v-e-r-a-l.

The Witness. Timothy Holmes was the one I worked with.

429 By Mr. Ford:

Q. Give me any and all other names you used. A. The passport name was Jackson.

Q. Does it have a front name to it? A. I think it was George Jackson. The name they gave me in Russia was George James.

Q. Would you spell that last for me, please? George what? A. J-a-m-e-s. George James is the Russian name they gave me.

That is all.

Q. Those three names comprise all of them; is that right? A. Those are my professional names.

Q. Now, George Jackson you said was used how? A. For my passport out of the country.

Q. Do you have it? A. I have the passport.

Q. Let me see it, please. A. No, not with me. I have it at home. I could send it to you, if you want me to.

Q. Yes, I would. Would you have it sent to me tomorrow morning? A. Well, I don't know. I will have to get it. My wife doesn't know where——

430 Mr. Kelley. What was the answer?

The Witness. I will have to have my wife send the passport.

By Mr. Ford:

Q. Now, is it or is it not a fact that you were expelled from the Communist Party after 18 years because of your conduct against the Negro people? A. I was never expelled.

* * * *

NOTE. For further cross examination of Hewitt see pp. 117-120 *supra*. In direct and cross examination of

For

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Hewitt as a witness called by defendant, see pp. 129-139 *supra*

886 *Garson Kanin*

was called as a witness for and on behalf of the defendant

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887 *Direct Examination*

By Mr. Ford:

• • • •

Q. And what is your occupation? A. I am a playwright and director.

Q. And you have shows going on now, have you, that you produced? A. Yes, sir.

Q. Do you know a Carl Marzani? A. Yes, sir.

Q. And I wonder if you can pick him out in this room, if you can. A. I would say that was Carl (pointing).

Mr. Ford. May the record show he pointed to the defendant, your Honor?

The Court. Yes.

By Mr. Ford:

Q. How long have you known him? A. I met Carl Marzani for the first time in the course of my Army duties in October 1942.

888 Q. And was that in the city of Washington? A. Yes, sir.

Q. And particularly, what duties, generally? Was that in the Office of Strategic Services? A. Yes, sir. I met him on the very first day that I was assigned to duty in the Office of Strategic Services, having been transferred from the Air Force in Texas.

Q. And beginning on that date, which I understood you to say was October 1942, for how long a period continuously after that did you know Mr. Marzani here in Washington? A. Until I went overseas for the Office of Strategic Services—

The Court. If you can tell the date, sir, that is the question.

The Witness. The exact date, sir.

The Court. No, I assume he wants the best that you know.

By Mr. Ford:

Q. Your best recollection. A. I see. Until May 1944, when I went overseas.

Q. And during that period of time you knew him here in the city of Washington; correct? A. Yes, sir.

Q. Now, since that time, the last date you gave, up until the present time, have you seen or talked to
889 Mr. Marzani? A. No. I haven't seen him since I left to go overseas, and I haven't talked to him, either in person or on the telephone.

The Court. Have you written him, sir, or he written you?

The Witness. I wrote him one letter, to which I received no reply.

By Mr. Ford:

Q. I will ask you, during that period in Washington, did you know other people in the community who knew him? A. Oh, yes, sir.

Q. Now, amongst those people, what was Mr. Marzani's reputation for truth and veracity? A. I don't distinguish the difference between them. Is there some reason why it is truth and veracity?

Q. No. Amongst those people, what was his reputation for truth? A. I would say it was excellent, as good as mine.

Q. Amongst those people, what was his reputation for peace and good order and being a law-abiding citizen? A. First-rate.

Q. And amongst those people, what was his repu-
890 tation for loyalty and integrity? A. Well, sir, the question never came up.

Mr. Ford. You may examine.

By Mr. Kelley:

Q. You shared, did you, that opinion concerning his reputation for loyalty? A. Yes, sir. I had no reason to doubt it.

Q. Would your testimony be the same if you knew that Carl Aldo Marzani had been a branch organizer for the Communist Party in New York in 1940 and '41? A. I am very sorry, I don't follow that question.

Q. Well, I will repeat it.

Would your testimony be the same as to your high regard for his reputation as to loyalty, if you knew that he had been a branch organizer for the Communist Party in New York City in 1940 and '41? A. Well, it seems to me the question answers itself, because—

Q. Well, no it does not. I want your answer. A. Well, obviously, if he were and did not make it known in any way, that would make him a man who was dishonest.

Q. In your opinion? A. Yes, sir.

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United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9595

CARL ALDO MARZANI, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the District of Columbia

Argued November 18, 1947. Decided February 2, 1948.

Mr. Arthur Garfield Hays, of the Bar of the State of New York, *pro hac vice*, by special leave of Court, and *Mr. Allan R. Rosenberg*, with whom *Messrs. Charles E. Ford* and *Warren L. Sharfman* were on the brief, for appellant.

Mr. John M. Kelley, Jr., Special Assistant to the Attorney General, and *Mr. Leo A. Roth*, Attorney, Department of Justice, with whom *Mr. George Morris Fay*, United States Attorney, was on the brief, for appellee. *Mr. Sidney S. Sachs*, Assistant United States Attorney, and *Miss Rosalie M. Moynahan*, Attorney, Department of Justice, also entered appearances for appellee.

Mr. Belford V. Lawson, Jr., filed a brief on behalf of the National Lawyers Guild as *amicus curiae*, urging reversal.

Mr. Joseph Forer filed a brief on behalf of the Civil Rights Congress as *amicus curiae*, urging reversal.

Before GRONER, C. J., and WILBUR K. MILLER and PRETTYMAN, JJ.

PRETTYMAN, J.: Appellant Marzani was indicted, tried, convicted and sentenced for having made false and fraudulent statements in a matter within the jurisdiction of an agency of the United States Government in violation of Section 80 of Title 18 of the United States Code. From the judgment of the District Court he appealed.

Appellant's first point is that the first nine counts of the indictment were barred by the statute of limitations. Dates are the important facts in this connection. In 1940 and 1941 Marzani lived and worked in private pursuits in New York City. In February, 1942, he applied

for a position in the Government service. On March 7, 1942, he was employed as a war service appointee, subject to a character and fitness examination. On July 29, 1942, in the course of that examination, he was interrogated under oath by a representative of the Federal Bureau of Investigation. On November 23, 1942, he was similarly examined by representatives of the Civil Service Commission. As a result of the latter inquiry, he was rated ineligible. He appealed, and on April 20, 1943, he was given a hearing before the Board of Appeals and Review of the Commission. That Board reversed the initial ruling and rated him eligible. He was employed in the Office of the Coordinator of Information and the Office of Strategic Services as a civilian from March, 1942, until November, 1943, and in the latter service in military status until September, 1945, when he was honorably discharged as a master sergeant, and then with the same organization in a civilian status again until November 15, 1946. During the latter period, his unit of O. S. S. was transferred to the State Department. Marzani was then Deputy Chief of the Presentation Division. On November 15, 1946, after some discussions with his superior, he resigned and entered private employment as a producer of films for labor unions. On December 20, 1946, he was notified that he had been discharged from the State Department in the interest of the United States.

Marzani was indicted January 17, 1947. The indictment was in eleven counts, the first nine of which related to statements made by him in the course of the F. B. I. and Civil Service Commission inquiries in 1942.

In general the statements alleged by the indictment to have been false were answers to questions whether Marzani had ever been a member of the Communist Party, ever attended meetings of that party, contributed services to that party, and similar inquiries. In the indictment and upon the trial, it was charged that his negative answers were false. The falsity was alleged to have been established by activities of the defendant in New York City in 1940 and 1941.

The ordinary period of limitations for these offenses is three years.[1] Unless the running of that period was suspended, in the manner to be discussed, the first nine counts of this indictment were barred. The question is whether the running of the ordinary limitation was suspended in this case.

Two statutes are involved. The first is that under which the indictment was laid, which is Section 80, Title 18, of the United States Code, in its present form an act of June 18, 1934,[2] with minor changes by an act of April 4, 1938;[3] Section 35 of the Criminal Code. For ease in discussion, we shall refer to the pertinent clause of this statute as the False Claims Act. That clause provides:

> ". . . ; or whoever shall knowingly and wilfully . . . make . . . any false or fraudulent statements or representations, . . . in any matter within the jurisdiction of any department or agency of the United States . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

[1] 45 Stat. 51 (1927), 18 U. S. C. A. § 582 (Supp. 1946).
[2] 48 Stat. 996.
[3] 52 Stat. 197.

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The other statute is Section 590a of Title 18 of the United States Code, which is an act of August 24, 1942,[4] as amended July 1, 1944,[5] and October 3, 1944;[6] Section 19(b) of the Contract Settlement Act of 1944 and Section 38 of the Surplus Property Act of 1944. For ease in discussion we shall refer to this statute as the Suspension Act. In pertinent part it provides:

> "The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, . . . shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress."

The question before us is whether the Suspension Act applies to offenses under the False Claims Act.

We see no escape from the conclusion impelled by two decisions of the Supreme Court, *United States* v. *Noveck*[7] (and its companion cases, *United States* v. *McElvain*[8] and *United States* v. *Scharton*[9]) and *United States* v. *Gilliland*.[10]

In *United States* v. *Noveck*, the question was whether a statute which read, "That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, . . . the period of limitation shall be six years",[11] applied to perjury in an income tax return. The indictment alleged that the perjury was for the "purpose of defrauding the United States". The Supreme Court held that the six-year statute did not apply, because defrauding the United States is not an element of the crime of perjury. The language of that statute of limitations is the same as that of the Suspension statute here involved; in fact, that statute was the predecessor to this one.

In *United States* v. *McElvain*, *supra*, the Court held that the six-year statute of limitations involved in *United States* v. *Noveck* did not apply to a conspiracy to defraud the United States by making a false income tax return. In *United States* v. *Scharton*, *supra*, the indictment was for an attempt to evade taxes by falsely understating taxable income. The defendant pleaded the statute of limitations. The United States contended that attempts to obstruct or defeat the lawful functions of any department of the Government, if accompanied by dishonest methods, are attempts to defraud the United States. The Court held that the six-year limitation applicable to

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[4] 56 STAT. 747.

[5] 58 STAT. 667.

[6] 58 STAT. 781.

[7] 271 U. S. 201, 70 L. Ed. 904, 46 S. Ct. 476 (1926).

[8] 272 U. S. 633, 71 L. Ed. 451, 47 S. Ct. 219 (1926).

[9] 285 U. S. 518, 76 L. Ed. 917, 52 S. Ct. 416 (1932).

[10] 312 U. S. 86, 85 L. Ed. 598, 61 S. Ct. 518 (1941).

[11] 42 STAT. 220 (1921).

offenses involving the defrauding of the United States, was not applicable to the offense described in that indictment.[12]

The United States seems to agree with the foregoing view of the *Noveck* and its allied cases. It says that the Suspension Act "was modeled upon the proviso" in the 1921 Act; that the 1921 and 1926 provisos "are in all essential respects identical with" the present Suspension Act; and that "said cases were decided in accord with the principle first enunciated in *United States* v. *Noveck*, to wit, that in order to be affected by the suspension statute 'defrauding or an attempt to defraud' the United States must be *an ingredient* under the statute defining the offense."

In *United States* v. *Gilliland*, *supra*, the question was whether the False Claims Act was restricted to matters in which the Government has some financial or proprietary interest. The Court held that it was not. The conclusion was premised largely on the fact that by amendment in 1934[13] Congress had eliminated from the statute as it had theretofore existed[14] the words "or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States," and that the legislative history of the amending act showed that this omission was deliberate and intentional. Thus, the Court held that defrauding the United States in a pecuniary or financial sense is not a constituent ingredient of offenses under the False Claims Act.

It necessarily follows, in our view, that the Suspension Act does not apply to offenses under the False Claims Act. The Supreme Court has clearly said (1) that a statute identical in pertinent part with the Suspension Act does not apply to offenses of which defrauding the United States in a pecuniary way is not an essential ingredient; and (2) that such defrauding of the United States is not an essential ingredient of offenses under the False Claims statute. If perjury on an official document required to be filed under a federal statute, the making of false income tax returns and an attempt to evade taxes are not defrauding the United States within the meaning of a statute of limitations, we do not see how making a false statement in the course of an inquiry into one's qualifications for federal employment can be.

The contention of the Government is that the *Gilliland* case, *supra*, merely held that an intention to swindle or defraud the Government, resulting in property or pecuniary loss, is not an element of proof under the False Claims Act; and that that Act retained, after its amendment, "all its essential fraud characteristics", that "the con-

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[12] Other cases referred to in the briefs in this connection are *Bailey* v. *United States*, 13 F. 2d 325 (C. C. A. 9th, 1926); *Weinhandler* v. *United States*, 20 F. 2d 359 (C. C. A. 2d, 1927), *cert. denied*, 275 U. S. 554, 72 L. Ed. 423, 48 S. Ct. 116 (1927); and *Falter* v. *United States*, 23 F. 2d 420 (C. C. A. 2d, 1928), *cert. denied*, 277 U. S. 590, 72 L. Ed. 1003, 48 S. Ct. 528 (1928). In the *Bailey* case, the court held that defrauding the United States was a statutory ingredient of the offense of uttering and publishing a forged indorsement to a Government check with intent to defraud the United States. In the *Weinhandler* case, the court held that fraud is an element of the crime of embezzlement, and that, therefore, the six-year limitation in the 1921 proviso applied. In the *Falter* case, the court held that a conspiracy to commit a civil fraud is a crime under the conspiracy statute.

[13] 48 STAT. 996.

[14] 40 STAT. 1015 (1918).

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ception of fraud against the United States formerly expressed in the statute" was retained by the 1934 amendment. It says that a false statement made in a matter within the jurisdiction of an agency of the United States *necessarily* [italics in Government brief] involves a fraud". The gist of the Government's contention is stated thus:

> "However, where an offense violative of the second clause involves 'knowingly and wilfully' making 'false and fraudulent statements,' the statute (recognizing the intrinsically wilful and fraudulent element in the very nature of the acts proscribed) does not require the government to establish proof of (a) intent to defraud, or (b) pecuniary or property loss to the United States. Hence, the essential fraud elements continue as a constant in Section 80, although the accidental language has changed insofar as 'intent of cheating and swindling or defrauding' found in the Act of October 23, 1918, may have varied the form rather than the substance of the offense."

The difficulty with the foregoing contention is that it ignores the plain ruling in *Noveck* and kindred cases. Those cases involved false statements, under oath. The offenses tended to obstruct, by dishonest means, the operation of a department of the Government. The Court held that the Suspension Act (actually an identical predecessor) does not apply to such offenses. So that even if the False Claims Act does involve the sort of fraud the Government says it does, the Suspension Act does not apply; the rulings in the *Noveck* and similar cases related to precisely that same sort of fraud. Despite the vigor and skill with which the Government's contention is pressed upon us by its counsel, we can see no escape from that conclusion. It follows that we are of opinion that the first nine counts of this indictment were barred by the statute of limitations, and the defendant's motion that they be dismissed should have been granted.

Appellant's next point is that the admission of the evidence relating the first nine counts was substantially prejudicial to defendant in respect to the last two counts, and that, therefore, the conviction upon those two counts must be set aside. The tenth and eleventh counts were that defendant had, on or about June 1, 1946, falsely represented to his superior in the State Department, in the course of an official inquiry into his fitness for retention in the Government service, that he had never been a member of the Communist Party and that he had never used the name or been known as Tony Whales. Counts I, V, VI and VIII charged that he made exactly the same false statements to the F. B. I. and the Civil Service Commission in 1942.

If the defendant had been on trial for only his two 1946 statements, the issue would have been the truth or falsity of those statements. Obviously, all the evidence relevant and material to that issue would have been admissible in such a trial. Note that these statements made by Marzani in 1946 were that he had *never* been a member of the Party or used the alias. Evidence that he had been a member and used the alias in 1940-41 was thus clearly admissible. That admissibility could not be nullified by the mere fact that he made the same statements in 1942. And we do not see that evidence that he had made the same statements in 1942 was prejudicial to him upon

a trial as to the truth of the 1946 statements; in fact, it would appear to have been beneficial, in that it showed that he had consistently from a time close to the event maintained the same position.

Evidence was also introduced to show that Marzani had attended meetings of the Communist Party, contributed services to that Party, participated in its activities, and made speeches against conscription. In Counts II, III, IV, VII and IX, respectively, it was charged that in 1942 and 1943 he had falsely stated to the F. B. I. and the Civil Service Commission that he had never done any of those things. The evidence that he had done them was directed to those particular counts, although its admission was not limited to them. Appellant especially urges that this evidence, relating, so he says, to the barred counts, was prejudicial to him in respect to the two valid counts. But we think that the evidence as to these several specific activities bore directly upon the charge that Marzani falsely said in 1946 that he had never been a member of the Communist Party. Evidence that he attended meetings of the Communist Party, contributed services to it, participated in many of its activities, and made speeches consistent with its policies was relevant, material, and indeed substantial evidence upon the disputed issue of membership in the Party. That he denied in 1942, as he did in 1946, that he had ever done those things does not seem to us prejudicial to him upon a trial of the issue whether he had or had not ever been a member of the Communist Party. Here again his undeviating consistency of position would seem to have been beneficial rather than prejudicial.

The sum of the foregoing is that we think that all of the evidence which was actually introduced at this trial, including the evidence of his 1940-41 activities, and the evidence that he made these same or similar statements consistently in 1942-43, would have been admissible in a trial limited to the last two counts of the indictment. Therefore, we can find no error in its actual admission here.

There remains, in connection with this phase of the case, the question whether the inclusion of the barred counts as issues upon the trial, and the submission of those nine counts to the jury, were substantially prejudicial to the defendant in a trial which could validly involve only the last two counts. It was error to permit the first nine counts to remain in the indictment and to go to the jury. The question is whether that error was prejudicial to the defendant's rights in his trial upon only the last two counts. The function of an appellate court under the applicable rule[15] and statute,[16] and the history and meaning of that rule and statute, have been too thoroughly and carefully stated recently by Mr. Justice Rutledge in the opinion in *Kotteakos* v. *United States*[17] to require elaboration. Two features of the case at bar determine the answer here. The first feature is that which we have just found, *i. e.*, that no evidence was improperly admitted by reason of the erroneous inclusion of the barred counts upon the trial. The second determinative feature of the case upon this point is that the statements alleged to have been false in the barred counts were the same as, or similar to, the statements involved in the two

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[15] Fed. R. Crim. P., 52(a).

[16] Sec. 269 of the Judicial Code, as amended, 40 Stat. 1181 (1919), 28 U. S. C. A. § 391 (1928).

[17] 328 U. S. 750, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946).

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counts properly on trial. The truth or falsity of the statements was the only issue, since Marzani did not deny making them. That issue depended entirely upon activities alleged to have occurred in 1940-41. Therefore, the issue actually submitted to the jury was actually and in fact the same as it would have been if only the last two counts had been submitted. If they were false in 1946, they were false in 1942, and vice versa. Our view on this point is the same as the view we have expressed above upon the evidence. We cannot see how the fact that he was charged with making a false statement in 1942 could be prejudicial to him in a trial involving the sole issue whether that same statement, made again in 1946, was true or false. The trial court told the jury, "The simple issue here involved is whether or not the defendant knowingly, wilfully, and feloniously made false and fraudulent answers to the questions asked of him." Those answers were the same in 1946 as in 1942—indeed they were categorically asserted as true by defendant on the witness stand. The evidence as to truth or falsity was the same as to all as it was to the two made in 1946. We think that the fact that the Government charged that the 1942 statements were, like the 1946 statements, false, was not, under those circumstances, substantially prejudicial to defendant's rights upon the trial.

Appellant's next point is that the trial court erred in its instruction to the jury upon the subject of good character. Defendant introduced evidence of good character. The court said to the jury, in the course of its charge:

> "And, I might add at this point, that evidence of good character, taken in conjunction with all the other evidence before you, might be sufficient to create in your minds a reasonable doubt."

This instruction followed almost precisely what we characterized in *Colbert* v. *United States*,[18] as "the language in which the instruction should have been couched." Appellant says that the clause "where, without it, you may have been convinced of his guilt" should have been added. Perhaps the suggested clause would have made clearer that which was already clear, but it would have done no more than that. We cannot find error in its omission.

Appellant next contends that the trial court improperly excluded certain evidence relating to Negroes because of the presence of nine Negroes on the jury, such exclusion being in violation of defendant's constitutional right to a fair trial. Because of the unique nature of this contention and the seriousness of the error if appellant's version of the reason for the disputed rulings by the court be correct, we have carefully read all the various portions of the printed appendix surrounding the incidents mentioned, although appellant does not cite to us any specific place at which the court indicated such reasons for its rulings. Appellant's general contention is that the combination of circumstances that nine of the twelve jurors were Negroes, that the three prosecution witnesses testifying to the falsity of defendant's statements were Negroes, and that the defendant himself was active in causes and upon occasions in behalf of Negroes, "conditioned the Court's rulings on the admission and exclusion of evidence". It is difficult to follow the precise course of appellant's argument in this respect, but his general statements and the implica-

[18] 79 U. S. App. D. C. 261, 146 F. 2d 10 (1944).

tions are such as to require examination of all that transpired. Appellant cites three examples. The first occurred when Marzani, on the witness stand, began to relate an incident concerning the beating of two Negroes by police in New York. The court called counsel to the bench and, adverting to a prior reference by Marzani to "leaks" by named officials of the State Department and the F. B. I. to named newspaper people, which the court had interrupted and stricken, told counsel that he foresaw an attempt to lead up to a prejudicial statement. The court referred to the "outburst with reference to the FBI and State Department" repeatedly, and iterated its determination that the case go to the jury "without prejudicial bias, sympathy or hatred". The utmost that the court said was "Well, the prejudice has happened here, so far as this is concerned, but in the future if you find yourself in a situation like that, will you please approach the bench?" When the trial was resumed, counsel for the defendant said, "Your Honor, I do not see how I can ask it except to bring out the discussion", and the court said, "All right, sir." The examination then proceeded without interruption.

The second example cited was in the course of the cross-examination of the prosecution witness Drew. Appellant says that the cross-examination was improperly limited by the court. He says, "The Court's refusal to permit this whole line of inquiry was erroneous . . ." We do not find that the court refused to permit the whole line of inquiry. When counsel for appellant had asked a series of questions of Drew concerning the National Negro Congress, the court called counsel to the bench and asked the purpose of the line of inquiry. In an extended colloquy, the court ruled that it would permit questions to establish that the testimony of another prosecution witness, Harper, concerning his membership in the Communist Party, was not true, and questions concerning meetings attended by the witness and the defendant and concerning any occasion as to which there was testimony upon direct examination; but the court said that it would not permit "at this time, sir" a question which included what the court thought was an erroneous statement of previous testimony by the witness, or questions concerning meetings and activities of the National Negro Congress not participated in by defendant and not testified to upon direct, and a series of questions of which an example was, "In 1940 and 1941, whenever you heard a person speak against police butality, did you consider that person a Communist?" We cannot find error in these rulings of the court. Full opportunity was given to explore the testimony given upon direct. The limitations were upon the testing of credibility by inquiring into matters not included in direct examination, and questions whether the witness "considered" certain persons Communists. We do not find in these rulings the basis which appellant sees behind them. So far as the record shows, the rulings would have been the same regardless of the racial composition of the jury. Appellant says that he sought to show that Drew was an *agent provacateur* in that he organized the National Negro Congress on the East Side. We do not find any undue restriction of cross-examination upon that subject. The witness was asked, and answered without objection or restriction, a series of questions upon it. He stated that he organized or helped to organize the East Side Council of the Congress, that the witness Harper helped

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him to organize it, and that he (the witness) solicited memberships in it. Full argument as to the witness's role was available to appellant upon that testimony. The witness's activities were collateral to the issue in this case. Only to the extent that they constituted misconduct which had a tendency to show his lack of honesty or truthfulness could he be cross-examined upon them, and the court, having permitted sufficient inquiry to establish the basic facts in this respect, could, in its discretion, control the extent to which the matter could be pursued.[19]

The third example cited by appellant under this point was in the course of the cross-examination of the prosecution witness Harper. Harper had testified that a meeting sponsored by the National Negro Congress had been held and that the defendant, under the name "Tony Whales", had spoken as a representative of the Communist Party. On cross-examination of Harper, counsel for defendant said, "I would like to have you list some of the purposes of the National Negro Congress; what its objects were." After the answer had proceeded somewhat, the court called counsel to the bench and after a colloquy announced that it would permit inquiry concerning the meeting but would not go into "the organization and desires and aims of this Congress." The court did not indicate that its reasons were those now assigned it by appellant; it said, "We are not concerned with that", obviously meaning that the subject matter was irrelevant to the issue in the case, which was the truth or falsity of defendant's statements that he had never been a member of the Communist Party or been known as Tony Whales. We find no error in the limitation imposed by the court upon the extent to which this line of cross-examination could be pursued.

The appellant next says that the court erred in permitting prosecution witnesses to use expressions such as "Communist Party", "Communist meetings" and "Communist activities", because they involved opinions as to what is a "Communist". We are given no citations to places in the record where objections were made to the use of such expressions. Moreover, the same objection might be made to the use of almost any word. ". . . there are few statements of fact that are not conclusions of fact."[20] Appellant also contends that it was error to permit the introduction in evidence of leaflets distributed at meetings attended by Marzani, at some of which he spoke. They were admitted to show the character of the party, the meetings and the activities with which the defendant was identified by presence or participation. We find no error in the rulings of the trial court upon these questions of evidence.

We have considered the entire evidence, both direct and cross, of the prosecution in this case as it is presented in the printed joint appendix, in order to ascertain the substance of that evidence and the fairness of its presentation. It is almost entirely specific, describing meetings, speeches and identified acts of the defendant, and personal acquaintance with him as "Tony Whales". The defendant

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[19] Pullman v. Hall, 55 F. 2d 139, 141 (C. C. A. 4th 1932), and authorities there cited; Simon v. United States, 123 F. 2d 80, 85 (C. C. A. 4th 1941), and cases there cited. *See* Ewing v. United States, 77 U. S. App. D. C. 14, 135 F. 2d 633 (1942), *cert. denied*, 318 U. S. 776, 87 L. Ed. 1145, 63 S. Ct. 829 (1943).

[20] 3 WHARTON, CRIMINAL EVIDENCE 2149 (11th ed. 1935).

in his turn categorically denied the occurrence of many of these events, explained the nature of his participation in others, denied that he had ever known some of the prosecution witnesses, and denied that he had ever been known as Tony Whales. There was a sharp issue of truth presented. The judge's charge was a careful, uncolored presentation of the issue to the jury. On the whole record, we must conclude that the jury decided the issue of fact thus presented. With that function this court cannot interfere.

The jury returned verdicts upon each of the counts. The court imposed sentence generally upon the verdict. Under the rule long since established[21] that "in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only", the judgment must be, and it is

Affirmed.

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[21] Claassen v. United States, 142 U. S. 140, 146, 35 L. Ed. 966, 968, 12 S. Ct. 169 (1891); Whitfield v. Ohio, 297 U. S. 431, 438, 80 L. Ed. 778, 56 S. Ct. 532 (1936).

[fol. 282] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Feb. 2, 1948. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, JANUARY TERM, 1948

No. 9595

CARL ALDO MARZANI, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the District of Columbia.

Before: Groner, C. J., and Wilbur K. Miller and Prettyman, JJ.

JUDGMENT

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Per Mr. Justice Prettyman.

Dated February 2, 1948.

[fol. 283] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Feb. 7, 1948. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, APRIL TERM, 1947. No. 48-47 CRIMINAL DISTRICT COURT

No. 9595

CARL ALDO MARZANI, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

PETITION FOR REHEARING

Comes now Carl Aldo Marzani, appellant in the above entitled cause, by his duly authorized attorneys, and without waiving any of the grounds of appeal heretofore made, presents this, his petition, for a rehearing of the above entitled cause, pursuant to Rule 26 of the General Rules of this Court, and, in support thereof, respectfully shows:

1. *The Court in its Opinion dated February 2, 1948 failed to pass upon the issue raised by appellant that the statute (U. S. C. Title 18, Sec. 80 (2)) as applied to the trial of the last and only timely two counts of the indictment herein is invalid because violative of appellant's rights to due process and a fair trial.*

The issue is whether the statute can be constitutionally applied to a prosecution for statements not required to be made, not under oath, not stenographically transcribed, never reduced to writing, made at a private conference [fol. 284] initiated wholly at appellant's request, which he was not required to attend, solely to ask the reasons of his superior in the government for a request which had been made for appellant's resignation, where the only two participants in the conference addressed each other throughout by their first names and discussed a wide variety of other topics, where no suitable notice was given by regulation or otherwise of the consequences of knowingly and wilfully making any false or fraudulent statements, and where the statute provides criminal penalties for false and fraudulent statements made "in any matter within the jurisdiction of any department or agency of the United

States". The controlling facts as to this issue, as set forth above, are based on the testimony of the only government witness to the conference in which the statements were made and are substantially undisputed. (Joint Appendix 48-55, 59-60, 176-179) The government in its brief concedes that appellant requested the interview, that he met and conferred privately with his superior, that he was not under oath and that the proceedings were not transcribed. It adds that appellant had been officially requested to resign and that his superior with whom he conferred was officially authorized to deal with security and personnel matters. (Brief for Appellee p. 3)

Does the application of the statute to a prosecution for false statements made under these circumstances meet the requirements of notice, duty, formality and definiteness which are constitutionally required for due process and a fair trial?

This issue was saved by the Supreme Court in passing on the constitutionality of this same statute in *United States* [fol. 285] v. *Gilliland* (312 U. S. 86, 91) where it held that the statute as applied in that case could not be deemed invalid because of the indefiniteness, because

"The affidavits and reports *required* had been sufficiently described and the *duty enjoined* had been *adequately defined.*"

In that case, the Secretary of the Interior had promulgated regulations under the so-called "Hot Oil" Act, which the President had approved, and a Board was thus set up, with which monthly reports on forms approved by the Secretary were required to be filed. The Supreme Court stated:

"Anyone presenting the *required* affidavits and reports to the Board set up under the *pertinent regulations* was *suitably charged with notice* of the consequence of knowingly and wilfully including therein any false and fraudulent statements." (underscoring supplied)

The limitations thus applied in the *Gilliland* case conform to the rulings by the Supreme Court in a long line of cases that no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes (*Lanzetta* v. *New Jersey* 306 U. S. 451, 453 (1939); see *Kline* v. *Frink Dairy* 274 U. S. 445, 458 (1927), that such

statutes must adequately, explicitly and unambiguously inform those subject to its terms what conduct will be considered criminal (*Kraus & Bros.* v. *United States* 327 U. S. 614, 621 (1946); and that every man should be entitled to know with certainty when he is committing a crime (*U. S.* v. *Reese* 214, 220 (1875).*

[fol. 286] In the light of these facts and applicable law, and particularly of this Court's decision in the case at bar, holding that it was error to permit the first nine counts to remain in the indictment and to go to the jury, the question of the validity of the last and only timely two counts, becomes of major importance. A decision, *sub silentio*, that these two counts are constitutionally valid, would not serve the ends of justice, would be an important decision on a question of the administration and constitutional application of this statute, probably untenable and in conflict with the weight of authority and on a federal question which has not been but should be settled.

Counsel for appellant, after diligent search, has been unable to find any case decided under this statute where a conviction has been sustained unless the circumstances of the case indicated that the statements alleged to be false were required to be made and suitable notice was given of the consequences of knowingly and wilfully making a false and fraudulent statement, under definitely ascertainable standards of guilt.

This issue as to the invalidity of the last two counts was properly raised, we submit, prior to and during the argument of this case and is properly before this Court. It is true that the point was not explicitly raised in appellant's main brief, and, to that extent, the omission of the Court to pass upon the point in its opinion may be the fault of appellant. The issue, however, was *raised* first raised in the Court below in Appellant's motion to dismiss the indictment,

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* Accord: *Screws* v. *United States* 325, U. S. 91, 102 (1944); *Herndon* v. *Lowry* 301 U. S. 242 (1937) *Collins* v. *Kentucky* 234 U. S. 634 (1934); *Smith* v. *Cahoon* 283 U. S. 553 (1931); *Connally* v. *General Construction Co.* 269 U. S. 385 (1936); *Champlin Refining Co.* v. *Corporation Commission* 286 U. S. 210 (1932); *Small Co.* v. *American Sugar Refining Co.* 267 U. S. 233 (1925); *United States* v. *Cohen Grocery Co.* 255 U. S. 81, 89, 92 (1921).

denied by that Court in its memorandum opinion (71 Fed. Supp. 615, 617-618 and renewed by appellant in sub-
[fol. 287] sequent motions during and after trial. (Joint Appendix 30-32, 46) It was raised explicitly by appellant in his Reply Brief (pp. 24-25) and by *amici curiae* in the briefs which they filed; it was argued briefly by counsel for appellant and more fully by counsel for the government in oral argument before this Court on November 18, 1947; and this Court by Order dated January 9, 1948, granted appellant's motion to amend its Reply Brief to include a conclusion thereto seeking dismissal of these two counts conformably with the argument thereon in this Reply Brief. This Court has power to decide the issue, under Rule 52(b) of the Federal Rules of Criminal Procedure, even though the error had not been brought to the attention of the Court. In this case, where substantial rights of appellant are affected, where the error was brought to the attention of the Court, in the manner indicated, and where appellant intends to raise the issue, if necessary, before the Supreme Court on a petition for a writ of certiorari, we submit that the Court in the interest of justice should exercise its power, grant this petition for rehearing and hear argument on the matter.

2. *The Court in its Opinion did not pass upon the issue raised by appellant that the admission in evidence of appellant's statements to the F. B. I. and to the Civil Service Commission in 1942-43 (Government Exhibits 20, 22, 30, 30(a), Joint Appendix 244-254) was prejudicial error because such evidence constituted proof of nine separate crimes, which this Court has held should not have permitted to remain in the indictment or to go to the jury.*

[fol. 288] The general rule of law is that proof of other crimes is not admissible to prove the crimes charged in the indictment, because of the prejudicial effect of such proof on the jury. The applicability of this rule to the case at bar was briefed extensively and raised at the oral argument by appellant (Brief for Appellant pp. 38-43, Reply Brief pp. 16-23) and by the Government (Brief for Appellee pp. 32-39) but neither the rule nor its applicability herein was adverted to in any way by the Court in its Opinion. The Opinion disposed of appellant's contention that the evidence under the first nine counts was prejudicial, by holding that such evidence, particularly as to appellant's 1940-41 activi-

ties, was relevant to the issue of the truth or falsity of appellant's 1946 statements under the last two counts, because the issue in both instances was the same, and that the relevance of the 1940-41 evidence could not be nullified by appellant's 1942-43 statements, which were beneficial rather than prejudicial, because they showed appellant's consistent and undeviating position in 1942-43 as in 1946.

In so holding, the Opinion did not consider some of the evidence of appellant's 1940-41 activities (See point 3 below) and failed entirely to pass upon any of the 1942-43 statements in the aspect of proof of other crimes for which, in the present posture of the case, appellant was not validly indicted or tried.

We submit that this question is one which affects substantial rights of appellant and that the Court should, therefore, pass upon this contention.

That the 1942-43 statements constituted proof of crimes is clear beyond cavil. These were the very statements in- [fol. 289] cluded in the indictment and submitted to the jury as a necessary part of the government's case in chief, upon which appellant was actually found guilty of nine separate violations of the False Claims Acts. The statements were the *sine qua non* of the convictions on these counts, since no such count could be sustained unless supported by a 1942-43 statement, whereas on a trial on the last two counts alone, the 1942-43 statements would be totally irrelevant.

Appellant did not introduce these statements as corroborative of the truth of his 1946 statements or to benefit himself by showing consistency of position. The government introduced them as the *sine qua non* of its case in chief to prove that they were false in the light of the 1940-41 activities and that thereby appellant had committed the crimes charged in the first nine counts. To show that appellant had denied that he was a Communist in 1942-43 does not prove that he was a Communist in 1946 or at any other time. In short, the 1942-43 statements are not relevant to prove the falsity of the 1946 statements; they were and are relevant only to the proof of the nine barred crimes. But the jury was presented with evidence establishing proof of these barred crimes and therefore must necessarily have reached its verdict on the last two counts in the light of the proof of the 1942-43 statements on which it found appellant guilty under the first nine counts. This is precisely what is prohibited by the rule of law as to proof of other crimes.

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Even if the Court is right in holding that the 1942-43 statements are relevant to a trial of the last two counts, the rule of law prohibiting proof of other crimes applies to make [fol. 290] the admission of such evidence reversible error "The general rule is that evidence of a wholly separate and independent crime, even though of the same nature is not admissible, *Kempe* v. *United States*, 5. Cir. 20 f. (2d) 736 . . . *little is to be gained by pointing out that its exclusion can hardly be justified on the ground of irrelevancy.*" *Modern Reed and Rattan Co.*, 159 (2d) 658, cert. den. 91 L. ed. 1215 (Reply Brief for Appellant p. 22).

The 1942-43 statements were irrelevant in the trial of the last two counts, or if relevant, were unnecessary to prove the government's case. Above all, they were prejudicial because they constituted proof of other crimes, and their admission in evidence, we submit, is reversible error.

Not having passed on the effect of the 1942-43 statements as proof of crimes not validly charged, the Court has affected substantial rights of appellant, without having met a contention properly raised in the briefs and argument.

The question involved is an important one of general law, and, although no case precisely on the point has been found, the great weight of authority sustains appellant's contention. We submit that the Court should exercise its power to grant appellant a rehearing and determine the question.

3. *The Court did not pass upon the issue that the admission on behalf of the government of evidence that appellant had advocated revolution, opposition to conscription, disintegration of the morale of the armed forces and the stirring up of racial discontent was prejudicial error, because such evidence constituted proof of crimes under Federal and State law, under counts barred by the statute of limitations.*

[fol. 291] The Court disposed of this issue by holding that all of the evidence submitted to the jury under the nine barred counts would have been admissible on a trial of the last two counts, since all such evidence was relevant and material on the disputed issue of membership in the Communist Party, which was raised in the tenth count.

In so holding, the Court, we submit, ignored Appellant's contention that some of the evidence (Joint Appendix 116, 98-99, 101, 103-105, 74-78, 106-107, 112-113, 115-117), particularly Appellant's advocacy of revolution and the use of

the army to overthrow the capitalists, (Joint Appendix 104-105, 116) constituted proof of crimes under Federal and State Law (cf. New York Penal Law §§ 160-166, *Gitlow* v. *New York*, 268 U. S. 652, and "*State Control of Subversive Activities*" IX Federal Bar Journal No. 1, pp. 76-78; U. S. C. Title 18, § 6) which fall within the rule of law prohibiting proof of other crimes. (Brief for Appellant pp. 41-42. Reply Brief pp. 16-23) The admission of such evidence cannot be justified on the ground stated by the Court that it was consistent with the policies of the Communist Party and therefore relevant to the issue of membership. There is no evidence in this record that the Communist Party at the time in question advocated the overthow of the government by force and violence and the most recent decision of the Supreme Court bearing on the question of such advocacy by the Communist Party is to the contrary. *Schneiderman* v. *United States*, 320 U. S. 118 (1942). The evidence in question was, therefore, irrelevant and unnecessary to prove membership, as to which direct evidence was admitted. Because the evidence in question [fol. 292] also constituted proof of other crimes under counts not validly on trial, it was prejudicial within the rule of law requiring reversal for the admission of such evidence.

The Court ignored this issue, which was raised in the briefs on both sides (Brief for Appellant p. 41, Brief for Appellee pp. 37-38, Reply Brief for Appellant pp. 16-23). For this and the further reasons urged under point 2 above, we submit that the Court should grant a rehearing and determine the question.

4. *The Court disposed of appellant's contention that the District Court prejudicially erred in permitting prosecution witnesses to use expressions such as "Communist," embodying opinions and conclusions, on the ground, in part, that "we are given no citations to places in the record where objections were made to the use of such expressions," whereas, in fact, appellant did give citations to such places in the record and objections were in fact made to the use of such expressions.*

See Brief for Appellant pp. 73, 75 footnote 14, 76 for citations to places in the record where objections were made to the use of such expressions (Joint Appendix 66-67, 77-78, 96-97, 265). We call the attention of the Court to the discussion of this question on pp. 71-77 of Appellant's Brief,

and on the grounds where urged, maintained that reversible error was committed. For this reason and because the Court disposed of our contentions, in part, on an erroneous ground, we submit the Court should grant a rehearing; upon the question now before it.

[fol. 293] 5. *The Court disposed of appellant's contention that the District Court prejudicially erred in permitting the introduction in evidence of Communist Party and other leaflets, not prepared or distributed by appellant, on the mistaken ground that: "they were admitted to show the character of the party, the meetings and the activities with which defendant was identified by presence or participation."*

As pointed out in our main brief (Brief for Appellant pp. 77-80, 9) these leaflets were admitted, over appellant's objections, without limitation or instructions to the jury as to the purpose for which such pamphlets might be considered. The Heine case 149 F. (2d) 485 cited by the government in its brief (p. 75), permitting the introduction of Nazi Party literature to show the character of the Nazi Party; its background and mode of operation, is distinguishable, and by inference supports appellant's position, because, in that case, the trial judge was "most circumspect in presenting all the issues and warning the jury against taking matters for granted." In the case at bar, the Court, although requested, failed so to charge the jury as to eliminate from its deliberations the danger of imputing to appellant the news expressed in the leaflets and merely reaching a verdict based on guilt by association. For the reasons urged in our main brief on this point and because the Court has disposed of our contention on an erroneous ground, we submit that the court should grant a rehearing.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted, [fol. 294] and that the judgment of the District Court be upon further consideration reversed.

Respectfully submitted, Allan R. Rosenberg, Warren L. Sharfman, Attorneys for Appellant.

Certificate of Counsel

We, counsel for the above named appellant, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for the purposes of delay.

Allan R. Rosenberg, Warren L. Sharfman.

Certificate of Service

I certify that on February 7, 1948, I served one copy of the foregoing petition on John M. Kelley Jr., Esq., Special Assistant to the Attorney General of the United States, Department of Justice, Washington, D. C. and one copy of the same on George Morris Fay, Esq., United States Attorney, U. S. District Court House, D Street between 4th and 5th Streets, N. W., Washington, D. C. by mailing these copies regular United States mail, postage prepaid.

Allan R. Rosenberg.

February 7, 1948.

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United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9595

CARL ALDO MARZANI, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Before GRONER, C.J., and WILBUR K. MILLER and PRETTYMAN, JJ.

ON PETITION FOR REHEARING

April 22, 1948

PRETTYMAN, J.: Upon his petition for rehearing, appellant stresses one point which was not raised upon his principal brief, was mentioned in his reply brief, and was not discussed by the court in its opinion. Appellant now states the point as follows:

> "The issue is whether the statute can be constitutionally applied to a prosecution for statements not required to be made, not under oath, not stenographically transcribed, never reduced to writing, made at a private conference initiated wholly at appellant's request, which he was not required to attend, solely to ask the reasons of his superior in the government for a request which had been made for appellant's resignation, where the only two participants in the conference addressed each other throughout by their first names and discussed a wide variety of other topics, where no suitable notice was given by regulation or otherwise of the consequences of knowingly and wilfully making any false or fraudulent statements, and where the statute provides criminal penalties for false and fraudulent statements made 'in any matter within the jurisdiction of any department or agency of the United States'."

Upon the trial there was a direct contradiction of evidence concerning the circumstances and content of the conversations which formed the bases of the last two counts of the indictment. A Mr. Panuch testified that he was Deputy Assistant Secretary for Administration; that about April 30, 1946, he directed his assistant to request Mr. Marzani's resignation from the State Department; that in the latter part of May Mr. Marzani came to his office and said that his resignation had been requested for security reasons and asked

"what it was all about"; that he advised Mr. Marzani that the request was made pursuant to his authority; and that he thereupon advised Mr. Marzani of the various charges against him, including the charge that he was a Communist, a member of the Communist Party in 1940 and 1941, and operated under the alias of Tony Whales. The witness further testified that Mr. Marzani replied that there was nothing to the charges; that Mr. Marzani took the charges up one by one and said, among other things, "I am not and never was a member of the Communist Party" and "I was never known as Tony Whales." The witness testified to a long ensuing conversation with Mr. Marzani, saying, "That was a long conference. I think it took over two hours. You see, it was in the nature of an appeal from Fearing's [the witness's assistant] request. . . . It was in the nature of an appeal from Fearing's request for his resignation, and the man was appearing before me as Deputy Assistant Secretary, and he was entitled to have his day in court, and we just threshed the matter out thoroughly." Mr. Marzani, in his testimony on the stand, gave a somewhat different cast to the interview.

It is true, as the appellant says, that the statements were not under oath and were not stenographically transcribed; that the interview was at appellant's request; that there were only two participants in the conference; that they addressed each other by their first names; and that they discussed a wide variety of topics. However, it appears with equal clarity that Mr. Panuch was appellant's superior in office, that he had requested appellant's resignation, and that the purpose of the interview was to afford the appellant an opportunity to discuss the requested resignation and the charges upon which it was based. The pertinent statute[1] does not limit the offense to formal statements, to written statements, or to statements under oath. It applies to "any false or fraudulent statements or representations, . . . in any matter within the jurisdiction of any department or agency of the United States". In *United States* v. *Gilliland*,[2] the Supreme Court observed:

> "The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described. We see no reason why this apparent intention should be frustrated by construction."

We see nothing vague about the language "false or fraudulent statements or representations" nor any ambiguity in the language "in any matter within the jurisdiction of any department or agency of the United States" which would place in doubt the requirement that a government employee, discussing officially with his superior an official request for his resignation, must be truthful.

Appellant's petition for rehearing is

Denied.

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1 Sec. 35 of the Criminal Code, 48 STAT. 996 (1934), as amended, 52 STAT. 197 (1938), 18 U.S.C.A. § 80 (Supp. 1947).

2 312 U. S. 86, 93, 85 L. Ed. 598, 61 S. Ct. 518 (1941).

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[fol. 297] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Apr. 22, 1948. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, APRIL TERM, 1948

No. 9595

CARL ALDO MARZANI, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Before: Wilbur K. Miller, Prettyman and Groner, JJ.

ORDER

On consideration of appellant's petition for rehearing herein and of appellee's opposition thereto, It is

Ordered by the Court that the petition for rehearing be, and it is hereby, denied, for the reasons indicated in the opinion this day filed herein.

Per curiam.

Dated April 22, 1948.

[fol. 298] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Apr. 27, 1948. Joseph W. Stewart.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 9595

CARL ALDO MARZANI, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

DESIGNATION OF RECORD

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint appendix to briefs.
2. Opinion.

3. Judgment.
4. Petition for rehearing.
5. Order and opinion denying petition for rehearing.
6. This designation.
7. Clerk's certificate.

Allan R. Rosenberg, Attorney for Appellant.

Certificate of Service

I certify that on April 27, 1948, I served one copy of the foregoing designation of record on John M. Kelley, Jr., Esq., Special Assistant to the Attorney General of the United States, Department of Justice, Washington, D. C. and one copy of the same on George Morris Fay, Esq., United States Attorney, U. S. District Court House, D Street between 4th and 5th Streets, N. W., Washington, D. C. by mailing these copies regular United States Mail, postage prepaid.

Allan R. Rosenberg.

[fol. 299] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 300] Supreme Court of the United States

Order Allowing Certiorari—Filed June 21, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court,
FILED
MAY 22 1948
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. [redacted] 59

CARL ALDO MARZANI,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 816

CARL ALDO MARZANI,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Carl Aldo Marzani, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia, affirming the judgment of the United States District Court for the District of Columbia, adjudging the petitioner guilty after conviction and imposing sentence, under the False Claims Act, 48 Stat. 996 (1934), 52 Stat. 197 (1938), Criminal Code, Sec. 35 A, U. S. C., Title 18, Sec. 80.

Opinions Below

The opinion of the Court of Appeals, dated February 2, 1948, appears at R. 272 and is reported at — F. (2d) —. Its opinion, dated April 22, 1948, denying petition for rehearing, appears at R. 292 and is reported at — F. (2d) —. The opinion of the District Court, dated April 25, 1947, denying the motion to dismiss the indictment, appears at R. 20 and is reported at 71 Fed. Supp. 615.

Jurisdiction

The judgment of the Court of Appeals was entered February 2, 1948 (R. 282). A petition for rehearing was denied on April 22, 1948 (R. 294). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. Section 347 (a)) and the Rules of Practice and Procedure in Criminal Cases promulgated by this Court.

Statutes Involved

The relevant provisions of the statutes involved are set forth in the Appendix, *infra*, p. 36.

Questions Presented

Defendant was convicted of eleven separate criminal violations of the False Claims Act. The Court below held that the prosecution on the first nine counts of the indictment was barred by the statute of limitations but affirmed the judgment of the District Court on the ground that the sentence, which was general, could be sustained on the remaining two counts, which it held good. The following principal questions are raised by the opinions:

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1. Can the False Claims Act be validly applied, consistently with the protection of petitioner's rights secured by the Fifth and Sixth Amendments to the Constitution and with the decision of this Court in *United States* v. *Gilliland*, 312 U. S. 86 (1941), to a prosecution for false statements by one government employee to another in the same government department, in a private discussion held pursuant to no law, rule or regulation, but initiated solely at defendant's request for the purpose of asking his superior in the department why defendant had been asked to resign, where such statements were not under oath, not witnessed, not stenographically transcribed, never reduced to writing, and not required to be made, where the only two participants in the conference addressed each other throughout by their first names and discussed a wide variety of other topics, where no suitable notice was given by regulation or otherwise of the consequences of knowingly and wilfully making any false or fraudulent statements and where the statute makes punishable such statements under no more definite or ascertainable standards of guilt than that they be made "in any matter within the jurisdiction of any department or agency of the United States"?

2. Was the petitioner deprived of his rights to due process and a fair trial under the Fifth and Sixth Amendments to the Constitution, and substantially prejudiced within the meaning of the applicable rule,[1] statute[2] and decision of this Court in *Kotteakos* v. *United States*, 328 U. S. 750 (1946) by reason of the inclusion of the nine barred counts as issues upon the trial, the submission of those counts to

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[1] Fed. R. Crim. P., 52 (a).

[2] Sec. 269 of the Judicial Code, as amended, 40 Stat. 1181 (1919), 28 U.S.C.A. § 391 (1928).

the jury and the admission of evidence relating to those counts, in a trial which, the court below held, could validly involve only the remaining two counts, where (1) the nine barred counts contained irrelevant, prejudicial and inflammatory matter, (2) the evidence admitted under those counts established proof of nine separate crimes under the False Claims Act and other crimes under other Federal and State laws, (3) such proof was not admissible on the issue of intent and (4) in any event, the trial court did not instruct the jury as to the purpose for which such proof should be considered?

3. Was petitioner deprived of his rights under the Fifth Amendment to the Constitution by reason of the holding of the court below that the general sentence of one to three years imprisonment, imposed by the trial court, upon a verdict of guilty as to each of eleven separate counts, must be sustained, although nine of the counts were held on appeal to have been barred by the statute of limitations, the holding is based solely on the presumption that the trial court imposed the same sentence for two violations of the statute that it would have imposed for eleven violations which included those two, and it is impossible to determine from the record what part of the sentence is attributable to the conviction on the barred counts, the remaining counts or any of the counts separately?

4. Was petitioner deprived of liberty without due process of law and the right to an impartial jury trial by a representative jury, in contravention of his rights under the Fifth and Sixth Amendments, by reason of the application by the trial court of a unique test for the admissibility of evidence, based on the presence of nine Negroes on the jury, rather than a general standard applicable to any representative

jury, and is the exercise of the supervisory power of this Court over the Courts of the District of Columbia properly invoked to correct the application of such a test?

Petitioner assigns as error by the court below the affirmative answer to the first and the negative answers to the second, third and fourth of the foregoing questions.

Summary Statement of Matters Involved

On January 17, 1947, petitioner was indicted in eleven counts for having made false and fraudulent statements in matters within the jurisdiction of departments and agencies of the United States in violation of the False Claims Act (R. 2-19).

The first nine counts of the indictment charged that the defendant, while employed by the Federal government, and in the course of authorized investigations as to his character and fitness, falsely stated to representatives of the Federal Bureau of Investigation in 1942 and to representatives of the Civil Service Commission in 1942 and 1943 that he had never been a member of, never attended meetings of, never contributed services to, and never participated in the activities of the Communist Party, never used the name Tony Whales, and never made any speeches against conscription. The falsity of each of these statements is specified in numerous and detailed particulars in certain of the counts. The remaining two counts charged that in 1946 defendant, while so employed and in such an authorized investigation, falsely stated to a representative of the State Department that he had never been a member of the Communist Party and had never used the name Tony Whales. In these counts, a single specification of falsity

is alleged as to each statement. For convenience, the indictment is summarized in the footnote.[2]

Before, during and at the close of the trial, defendant moved to dismiss the first nine counts as barred by the

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[2]

Count	Date of Statement	Nature of Statement	Statement Made to Representative of	Number of Specifications As to Falsity	Defendant Employed by
1.	July 29, 1942	Never a member of Communist Party	F. B. I.	1	O.S.S.
2.	July 29, 1942	Never attended meetings of Communist Party	F. B. I.	13	O.S.S.
3.	July 29, 1942	Never contributed services to Communist Party	F. B. I.	11	O.S.S.
4.	July 29, 1942	Never participated in activities of Communist Party	F. B. I.	11	O.S.S.
5.	Nov. 23, 1942	Never used the name Tony Whales	Civil Service Commission	1	O.S.S.
6.	Nov. 23, 1942	Never a member of Communist Party	Civil Service Commission	1	O.S.S.
7.	Nov. 23, 1942	Never made any speeches against conscription	Civil Service Commission	2	O.S.S.
8.	Apr. 20, 1943	Never used the name Tony Whales	Board of Appeals and Review of the Civil Service Commission	1	O.S.S.
9.	Apr. 20, 1943	Never made any speeches against conscription	Board of Appeals and Review of the Civil Service Commission	1	O.S.S.
10.	June 1, 1946	Never a member of Communist Party	State Department	1	State Dep't
11.	June 1, 1946	Never used the name Tony Whales	State Department	1	State Dep't

statute of limitations (R. 20, 31, 46). Defendant's motions having been denied by the trial court, the case was tried on all eleven counts, defendant was found guilty on each count, and the court sentenced him generally to one to three years imprisonment on all eleven counts (R. 47).

Defendant's Statements: In 1942, defendant came to Washington and was employed by the Federal government in the Office of the Coordinator of Information and later in the Office of Strategic Services as a war service appointee, subject to a character and fitness examination. In the course of that examination, he was formally interrogated in 1942 by representatives of the F.B.I. and of the Civil Service Commission, and stated under oath that he was not and had never been a member of the Communist Party and that he had never attended its meetings, participated in its activities, contributed services to it, used the name Tony Whales or spoken against conscription (Tr. 103-109, R. 244-247).[4] He was, nevertheless, rated ineligible for further responsible government employment. He appealed to the Board of Appeals and Review of the Commission in April, 1943, and in sworn testimony in a formal hearing before that Board, again stated that he had never used the name Tony Whales and had never made any speeches against conscription (Tr. 213, 215-216; R. 249-254). That Board reversed the previous ruling and rated him eligible (Tr. 334-335). He continued as a civilian employee of the O.S.S. until inducted into the Army as a private. He was then reassigned, in military status, to his former position in the O.S.S. and after overseas service, was honorably discharged as a master sergeant (R. 173, 175). He remained in the employ of the O.S.S. and later of the State Department, to

[4] The reference "Tr." is to the original transcript of record certified to this Court by the court below. The original exhibits are referred to as "Defendant's Exhibit" or "Government Exhibit".

which his O.S.S. unit had been transferred. Having been requested, on April 20, 1946, to resign for security reasons, he sought an appointment with Panuch, Deputy Assistant Secretary for Administration, his superior in the State Department, to ask an explanation, and to state his desire to resign but unwillingness to do so under fire (R. 178). At the ensuing meeting on June 1, 1946, between Panuch and defendant, which was private and informal, defendant again stated that he had never been a member of the Communist Party and had never used the name Tony Whales (R. 48-55). Thereafter, upon apparent assurances that his record was clear, defendant resigned and entered private employment as a producer of films for labor unions (R. 59, 176-181, 202). After his resignation, he was notified that he had been discharged from the State Department in the interest of the United States. (Defendant's Exhibit No. 1, Government's Exhibit 35, Tr. 286, 360).

Proof of the Falsity of Defendant's Statements: The government introduced proof that during 1940-1941 when defendant lived on the lower East Side of New York and worked as an economics instructor at New York University, he was a member, organizer and educational director of a section or branch of the Communist Party; used the alias Tony Whales, attended numerous public and private meetings of the Party; conducted study classes for it; spoke, under its auspices, against the Smith-Connally Bill, the Selective Service Bill, and other legislation; gave lectures on the principles of communism; advocated opposition to the entry of the United States into the war and the abolition of discrimination and segregation against Negroes; was active in promoting a branch of the National Negro Congress on the lower East Side; and performed such other services, and engaged in such other activities for the Party as collecting membership books and distributing tickets to a

Soviet movie then showing in New York City (R. 257-258, 260; 71-74, 76, 82, 94-117, 121-122, 156-242).

Several matters arising from the conduct of the trial and the holdings of the court below require further statement to explain the basis in the record for the questions here presented. These matters are as follows:

The interview with Panuch: The government concedes that defendant requested the interview; that he met and conferred "privately" with Panuch; that the statements were not under oath and not stenographically transcribed.[5] It is undisputed that there were only two participants in the discussion, one the superior of the other in office (R. 48); that they addressed each other by their first names throughout and were on "quite a good personal relationship" with each other (R. 49, 176); that they discussed a wide variety of topics other than the charges and defendant's statements with respect to the charges in a long conference lasting "over two hours . . . in which we just threshed the matter out thoroughly" (R. 52); that Panuch had never heard of the proceedings before the Civil Service Commission, or the F.B.I., until defendant told him about them at the interview (R. 51); and that the interview was not preceded by any notice of charges or regulated by any law or rule of the Civil Service Commission, or otherwise, defining obligations or establishing procedural safeguards, and was never reduced to writing (R. 293, 55, 176). There is nothing in the record to show that this private, informal, unregulated discussion between two government employees in the same government department was on the same level, or could reasonably be thought by the defendant to be of the same nature as the formal interrogations by the F.B.I. and

[5] "On June 1, 1946, pursuant to his request for an interview, defendant met and conferred privately with Mr. Panuch. Defendant was not under oath and the proceedings were not transcribed." (Brief for Appellee, p. 3.) (R. 47-55).

the Commission in 1942 and 1943, or the hearing before the Board of Appeals and Review of the Commission in 1943, or had risen to the dignity of a "matter within the jurisdiction of the United States", as required by the statute.

The court below, however, without adverting to the absence of pertinent regulations, or other safeguards, held that the False Claims Act was applicable to false statements made under these circumstances because defendant was engaged in "official" discussions with his superior (R. 293). For reasons stated below this holding is assigned as error.

The evidence admitted under the nine barred counts of other crimes and prejudicial matter for which defendant was not validly on trial in the last two counts:

1. The government's case as to the falsity of all of defendant's statements was limited to evidence of defendant's activities in 1940-1941 in New York City. Included in such evidence was testimony tending to establish that defendant was guilty of violations of the New York Anarchy Act (New York Penal Laws, Secs. 160-166, *Gitlow* v. *New York*, 268 U. S. 652 (1925)), the Seditious Conspiracy Act (35 Stat. 1089, U. S. C. Title 18, Section 6 (1909)), and the Alien Registration Act, 1940 (54 Stat. 670 U. S. C. Title 18, Secs. 9-17 (1940)), in that defendant advocated, to a meeting sponsored by the National Negro Congress, a Communist revolution in the United States "now" (R. 116) and urged fellow-Communists that "the young men in the Communist Party must get into the Army so that we can disintegrate the morale of the armed forces in order that the Communists may take over . . . overthrow the capitalists and also take over control of the Army"(R. 104). Such evidence was admitted under the specific allegations of Counts III (k) and IV (k) which allege such advocacy as proof of the falsity of defendant's general statements to the F.B.I. in 1942 that he had never contributed services to or participated in the activities of the Communist Party (R. 5-9).

2. Also included in the evidence of defendant's activities in 1940-1941 was testimony that defendant had counselled and instructed Party members to infiltrate the National Negro Congress for the purpose of creating a Communist front organization and to sow resentment and discontent among Negroes by agitating questions of racial discrimination in order to recruit Party members (R. 74-78, 106-107, 112-113, 115-117, cf. 66-67, 70) admitted under Counts III and IV (e) and (h) (R. 5-9). In its effect upon the jury, such evidence is as prejudicial as the proof of other crimes. Defendant contended to the court below that both the proof of other crimes, under other federal and state laws, and the evidence, cited above, in the nature of crimes, were irrelevant and prejudicial on a trial of the last two counts.

The court below rejected defendant's contentions on both scores, and held that the evidence under these counts was admissible on the trial of the last two counts because such evidence was "consistent with (the) policies" of the Communist Party and therefore relevant upon the disputed issue of defendant's membership in the Communist Party under Count X (R. 277). There is no evidence whatsoever in this record as to the official advocacy by the Communist Party of revolution "now" or the sowing of resentment and discontent among Negroes. For reasons stated below, defendant assigns this holding as error.

3. To support each of the nine crimes charged in the first nine counts, the government introduced, as a part of its case in chief, documentary evidence of defendant's sworn statements to the representatives of the F. B. I. in 1942 and of the Commission in 1942 and 1943 (R. 244-254), identified by the stenographers who transcribed such statements and by the investigators who conducted the interrogations. (Tr. 109-111, 116; 120, 125-126; 152, 154; 194-195; 210, 216, 217-220; 227-228).

That these nine statements constituted an indispensable part of the proof of nine crimes, each separate and distinct from the other, is clear beyond cavil. The trial court ruled that the statements were separate (R. 25-26). For having knowingly, wilfully and falsely made them, defendant was convicted of nine separate crimes.

It is equally clear that, on that issue of defendant's knowledge and wilfulness, these nine statements which were sworn, documented and formal, must necessarily have had a decisive effect upon the jury in its consideration of the two later statements to Panuch, which were unsworn, oral and informal.

Defendant, therefore, contended, in the court below, that the admission of these nine statements, if prosecution thereon was barred, substantially prejudiced defendant's rights in the trial of the statements in the last two counts.

The court below, however, rejected this contention, holding that the error did not prejudice defendant in a trial which could validly involve only the last two counts, because the nine earlier statements were the same or similar to the statements in the last two counts, the issue submitted to the jury on the trial of eleven counts was the same as it would have been if only the last two counts had been submitted, and the nine statements were beneficial to defendant, rather than than prejudicial, in that they showed that from a time close to the event, defendant had consistently and undeviatingly maintained the same position (R. 277-278. For reasons stated below, defendant assigns this holding as error.

The trial court's failure to treat the predominantly Negro jury as a representative jury and the resulting exclusion of relevant evidence considered too prejudicial for this jury to consider: The government's case as to the falsity of defendant's statements was introduced through three witnesses (Hewitt, Harper, Drew) who were Negroes. The subject

matter of their testimony concerned in substantial part their own and defendant's activities in connection with a branch of the National Negro Congress on the lower East Side in New York City in 1941 and 1942. Nine members of the jury who heard the case were Negroes. Defendant is white. (R. 70 et seq., 105 et seq., 254-255). These facts are not denied.

The effect of this combination of circumstances on the trial court's rulings is illustrated by the following three examples:

Harper testified that he had attended a Communist meeting at defendant's home (R. 71-74, 76, 82). Defendant sought to testify that the meeting was not a Communist meeting, and to identify the time and subject matter of the meeting by reference to an incident involving police brutality against two Negroes (R. 185-186). The trial court halted the testimony and, in conference at the bench, held that the reference by defendant to police brutality against Negroes had "other purposes," that "the prejudice has happened here" and that defendant was significantly making use of such testimony to prejudice the jury (R. 186-189). Counsel for the government stated that "there could be no fair trial before *this* jury, if you go into the beatings" (R. 188, italics supplied) and announced the government's intention to move for a mistrial if the testimony persisted. The trial court thereupon limited defendant's direct examination to avoid specific references to thes incident of police brutality against Negroes (R. 188).

Drew, a member of the New York City Police Department, testified on direct examination that pursuant to official instructions, he had joined the Communist Party on the lower East Side as an undercover police agent, under a false name and with fictitious identifications, and met and dealt with defendant as fellow Communist (R. 88-90, 92-117,

120-122). Included in Drew's direct examination and in the examination of his superior officer in the Police Department, were references to the fact that Drew had been assigned to investigate the National Negro Congress (R. 64-67, 70, 106) but that finding no branch of this organization on the lower East Side, he had created such a branch, solicited members for it, chaired its meetings, written pamphlets for it, become the head of it, and simultaneously reported on the activities of the organization and its members to the Police Department (R. 89-91, 106, 112-114, 117). Some of this testimony referred to events at which defendant was not asserted to be present. Defendant sought to cross examine as to these activities for the purpose of impeaching Drew's credibility and establishing his duplicity as an *agent provocateur*. The trial court halted such cross examination, limited it to meetings where both Drew and defendant were present, about which there had been testimony and forbade certain questions altogether (R. 123-126, 105).

Harper, as well as Drew, testified about defendant's activities on behalf of the National Negro Congress (R. 74-76, 83-84, 86, Tr. 458). Defendant sought to cross examine both Harper and Drew as to the objects of the National Negro Congress. The trial court refused to permit such cross-examination (R. 79-81).

The trial court explained his reasons for this limitation of evidence in extended colloquies at the bench (R. 79-81, 123-126, 186-189). His remark to counsel for defendant that the testimony of defendant with respect to the incident involving police brutality, which was directly in conflict with the testimony of Harper, had the "other purpose" of prejudicing the jury and, in fact, did prejudice it, is clearly the rationale for his earlier rulings limiting Drew's cross-examination and his refusal to go into "this National (Negro) Congress," on the cross examination of Drew and

Harper, although offered as to subject matter about which these witnesses had testified on direct.

Defendant contended in the court below that the trial court unproperly excluded this relevant and important evidence solely because of its apprehension that the predominantly Negro jury could not consider the evidence on the same terms that any other representative jury would have considered it and that thereby defendant was unconstitutionally deprived of a fair trial before a representative jury.[6]

The court below rejected defendant's contentions on the ground that defendant's examination with respect to the incident of police brutality "was allowed to proceed without interruption" (R. 279) although specific reference to the incident was forbidden by the trial court as prejudicial; that "full opportunity was given to explore the testimony (of Drew) given on direct" (R. 279), although the record unequivocally demonstrates otherwise (R. 123-126, 105; cf. 89-91, 106, 112-114, 117), that such limitations as were imposed on the testimony of Drew had to do with "the testing of his credibility by inquiring into matters not included in direct examination (R. 279)," although again the record demonstrates otherwise, (R. 123-126, 105; cf. 89-91, 106, 112-114, 117) and were a proper exercise of the trial court's discretion, because Drew's activities as an *agent*

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[6] The government has, at least inferentially, conceded that the trial court took into consideration in its rulings the predominantly Negro composition of the jury. In its brief in the court below, it stated "As respects the evidence under discussion, the court, in one sense, may have justifiably given a measure of consideration to the fact that there were Negroes on the jury. The merit in the government's objection that the evidence was collateral, self-serving and therefore prejudicial, being obvious—it would have been no more than natural for the court to have considered how much greater that prejudice would be, with Negroes on the jury, in view of the very nature of the evidence sought to be introduced by appellant concerning his activities 'on behalf of' that race". (Brief for Appellee, p. 65).

provocateur were collateral to the issues in the case (R. 280); that "full *argument* as to Drew's role was available to appellant upon th attestimony,"[7] (R. 280) presumably in substitution for the right of cross-examination; and that the refusal to permit examination into the "organization, aims and desires of this (National Negro) Congress" was proper because irrelevant to the issue in the case of the truth or falsity of defendant's statements (R. 280). For these reasons, the court below held that while the trial court imposed restrictions on the right of cross examination, the restrictions were not undue, were not based upon its failure to treat the predominantly Negro jury as a representative jury, and would have been the same regardless of the racial composition of the jury (R. 280). For reasons stated below, defendant assigns these holdings as error.

Reasons for Granting the Writ

1. *The False Claims Act, as applied in the trial of the only timely two counts of the indictment, deprived defendant of his rights under the Fifth and Sixth Amendments to the Constitution.*

The court below held that the False Claims Act was constitutionally applicable in the trial of the last two counts in this case, to make criminal false statements uttered in a private, informal, and unregulated discussion between two government employees in the same department, on the ground that the discussion was, nevertheless, "official." In so holding, the court has decided in a novel manner a question of general importance relating to the construction and application of the Constitution and a federal statute. This holding far transcends the interest of the government and the defendant in this particular case, and reaches into the daily relations of millions of government employees with

[7] Italics supplied.

each other, and of persons generally in their dealings with the government, with ultimate effect upon the entire character of the government service.

Even on the narrow ground of the particular facts of this case, where the false statements were alleged to have been in an official discussion concerning defendant's resignation which had been requested for security reasons, the decision is of far-reaching application. The President's Loyalty Order of March 21, 1947 [8] involves a loyalty investigation of approximately 2,000,000 [9] government employees, plus all applicants for federal employment.[10] At the outset, it was estimated that the program would require investigations in 135,000 existing cases.[11] If, in the course of these investigations, any federal employee makes false statements in discussing charges of disloyalty against him with his superior in office, in the kind of private, informal, unregulated conversation that occurred in this case between defendant and Panuch, the False Claims Act is applicable, under the decision of the court below, and the employee is subject to fine and imprisonment. The Loyalty Order and the regulations [12] of the Loyalty Review Board, established pursuant

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[8] Executive Order 9835, 12 Fed. Reg. 1935 (1947).

[9] Statement of Seth W. Richardson, Chairman, Loyalty Review Board, U. S. Civil Service Commission, Press Release, Dec. 23, 1947, p. 2.

[10] *The Report of the President's Temporary Commission on Employee Loyalty*, dated November 25, 1946, states that during the period July 1, 1941 to December 31, 1946, the Civil Service Commission investigated 392,889 cases covering qualifications, character and loyalty, or 12.2 per cent, of the total of 9,604,935 placements in government service during the period. The Report shows 868,443 placements during 1946 and 119,624 placements for a six months period in 1947. U. S. Civil Service Commission, Press Release, November 25, 1946, pp. 17-19.

[11] Hearings before House Subcommittee on Appropriations on Supplemental Appropriations Bill for 1948, 80th Congress, 1st Sess. 38 (1947) pp. 8, 33. See O'Brien, *Loyalty Tests and Guilt by Association* (1948) 61 Harvard Law Review, 592, 607.

[12] 13 Fed. Reg. 256 (1948) See also, Statement of Seth W. Richardson, Chairman, Loyalty Review Board, U. S. Civil Service Comm'n, Press Release, Dec. 23, 1947.

to the Order, rightly require that with respect to the far lesser punishment of removal from office on the ground of disloyalty, the employee should be entitled to far greater protection. Thus, the directives to employing agencies issued by the Loyalty Review Board, established pursuant to Executive Order 9835, require that the employee charged with disloyalty shall be served a notice in writing at least thirty days in advance of the proposed removal, giving the employee the following information: a statement of the charges against him in factual detail; his right to answer the charges in writing, under oath or affirmation, within a specified reasonable period of time; his right to have an administrative hearing before a loyalty board in the agency, upon his request; his right to appear before such board personally, to be represented by counsel of his own choosing and to present evidence in his own behalf; and the authority (executive order and statute, if applicable) under which the notice is being sent. A further directive of the Board requires that "the hearings before the boards shall be conducted in an orderly manner and in a serious business-like atmosphere of dignity and decorum. . . . Testimony shall be taken under oath or affirmation (and) shall be recorded and transcribed and made a permanent part of the record in the case. . . . Wherever possible the testimony shall be taken verbatim and transcribed, (otherwise by) suitable notes . . . which shall be summarized and agreed to by all parties."[13] It will be noted that substantially all of the safeguards provided by these regulations were entirely lacking in the informal discussion which defendant had with Panuch. His statements at that interview were not under oath, not stenographically transcribed, and never reduced to writing; there was no written prior notice of charges, no opportunity to answer in writing, to be repre-

[13] 13 Fed. Reg. 256.

sented by counsel, or to present evidence before a board, no notice of the authority under which the interview was to be conducted and no record or even knowledge by Panuch of the previous interrogations and hearings on the same subject by the F. B. I. and the Commission; the interview was conducted informally on a "Hello Joe—Hello Carl" basis, which hardly comported with "a serious business-like atmosphere of dignity and decorum" or gave defendant suitable notice of the consequences of knowingly and wilfully making any false or fraudulent statements in a matter within the jurisdiction of the United States.

The interview was not in conformity with the applicable provisions of Rule XII [14] and Departmental Circular 222 [15] of the Civil Service Commission which require, at the minimum, written notice of the charges against the employee and a reasonable time for personally answering the same in writing, such documents to be made a part of the records of the department (Tr. 200, Gov't. Exhibits 24, 24A). It was not in conformity with the minimum principles of the Hearing Procedures of the Personnel Security Board of the State Department,[16] effective October 7, 1947. These Procedures require the employee to be served with written prior notice of the hearing; the charges, where possible; his privilege of replying to the charges, of appearing with counsel at a hearing, and of presenting evidence in his own behalf, and entitle him to present sworn testimony, if he so requests, or to refuse to answer any questions, with a stenotypist record to be made of the testimony.

In short, the Panuch interview, which was not a removal proceeding but a discussion about a voluntary resignation,

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[14] Civil Service Act, Rules and Regulations Annotated (1943 ed.) p. 283.

[15] Id. p. 291.

[16] Cf. Dept of State Press Release No. 798 ,Oct. 7, 1947). See also Dept. of State Press Release No. 874, (Nov. 1, 1947) 886 (November 5, 1947) and 960 (December 10, 1947).

was wholly beyond the procedures established by any regulations and lacking in the safeguards intended to be set up by those procedures. In holding that the False Claims Act was constitutionally applicable to the trial of statements made at such a interview, the court below ignored these factors.

The existence of the Regulations of the Loyalty Review Board and of the Hearing Procedures of the State Department, now in effect, does not preclude a repetition of the type of interview which defendant had with Panuch, any more than the existence of the Civil Service Regulations and Circular then in effect precluded the occurrence of that very interview. Indeed, with the present unprecedented increase in loyalty investigations, the number of such informal interviews is also likely to increase. If the decision of the court below is upheld, government employees will converse with their superiors on loyyalty matters at the peril of going to jail, if they make false statements.[17]

The decision of the court below has an even more general importance than in its application of the False Claims Act to false statements with respect to requested resignations on loyalty grounds uttered under the circumstances shown by the trial of counts X and XI. Its holding by necessary implication is that any false statement made by one government employee to another, by any applicant for government employment to a government employee, or by any private person to a government employee on *any* "official" matter is punishable under the statute, although the false statement is made with the same lack of formality, under the same absence of obligation, and pursuant to the same lack of regulations as characterized defendant's statements to

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[17] See Statement of the Attorney General before the House Committee on Un-American Activities, Feb. 5, 1948, Dept. of Justice Press Release, referring to the intention of the Department of Justice to use the False Claims Act in prosecutions of the type of the *Marzani* case. (p. 3)

Panuch. By thus equating "official" to "any matter within the jurisdiction of the United States," the court below has given the False Claims Act a construction, so novel and far-reaching, that the settlement of the question by this court is required.

The constitutional question involved was saved by this Court in passing on the constitutionality of this same statute in *United States* v. *Gilliland*, 312 U. S. 86, 91 (1940) where it held that

> "Nor can the statute be deemed to be invalid because of indefiniteness. The affidavits and reports required had been *sufficiently described* and the *duty enjoined* had been *adequately defined.*"[18]

In that case, the Secretary of the Interior had promulgated regulations under the "Hot Oil" Act, which the President had approved, and a Board was thus set up with which monthly reports were required to be filed on forms approved by the Secretary. This Court stated:

> "Any one presenting the *required* affidavits and reports to the Board set up under the *pertinent regulations* was *suitably charged with notice* of the consequences of knowingly and wilfully including therein any false and fraudulent statements."[19]

The limitations thus applied in the *Gilliland* case conform to the rulings by this Court in a long line of cases that no one may be required at the peril of life, liberty or property, to speculate as to the meaning of penal statutes (*Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939) see *Kline* v. *Frink Dairy*, 274 U. S. 445, 458 (1927); that such statutes must adequately, explicitly and unambiguously inform those subject to its terms what conduct will be considered criminal;

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[18] Italics supplied.

[19] Italics supplied.

(*Kraus & Bros.* v. *United States*, 327 U. S. 614, 621 (1946)); and that every man should be entitled to know with certainty when he is committing a crime (*United States* v. *Reese*, U. S. 92 U. S. 214, (1875)).[20]

No case has been found under the False Claims Act where a false statement was held punishable, unless the matter within the jurisdiction of the United States, as to which the statement was made, was defined by some other law, rule, regulation or proclamation, or the statement was made under circumstances which otherwise gave suitable notice of the criminal consequences involved.[21]

The key words of the statute are "in any matter within the jurisdiction of any agency or department of the United States." Standing alone, unlimited by any regulation or applied under circumstances which do not adequately define the obligation, enjoin the duty, or give suitable notice of criminal consequences, they provide no reasonable standard of guilt and attempt to cover so much that they effectively

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[20] Accord: *Winters* v. *New York*, 333 U. S. 507 (1948); *Musser* v. *Utah* 333 U. S. 95 (1948); *Screws* v. *United States*, 325 U. S. 91, 102 (1944); *Herndon* v. *Lowry* 301 U. S. 242 (1937); *Collins* v. *Kentucky* 234 U. S. 634 (1934); *Smith* v. *Cahoon* 283 U. S. 553 (1931); *Connally* v. *General Construction Co.* 269 U. S. 385 (1936); *Champlin Refining Co.* v. *Corporation Commission* 286 U. S. 210 (1932); *Small Co.* v. *American Sugar Refining Co.* 267 U. S. 233 (1925); *United States* v. *Cohen Grocery Co.* 255 U. S. 81, 89, 92 (1921).

[21] See for example: *United States* v. *Zavala* 139 F. 2d 830 (C. C. A. 2, 1944) (false statements on customs declaration, a matter within jurisdiction of United States by virtue a regulation, executive order and the Trading with the Enemy Act, of which defendant was given prior notice); *United States* v. *Meyer* 140 F. 2d 652 (C. C. A. 2, 1944) (false statements in a formal hearing before an Exclusion Board, established under executive order and regulations with notice to defendant); *United States* v. *Heine* 149 F. 2d 485, *United States* v. *Barra* 149 F. 2d 489 (C. C. A. 2, 1945) (false statements in an application for a "certificate of identification" required by Presidential proclamation and procured in accordance with detailed regulations of Attorney General); *United States* v. *DeLorenzo* 151 F. 2d 122 (C. C. A. 2, 1945) (false statements in an application for Federal employment subject to certification by Civil Service Commission of which defendant was aware).

cover nothing. The record shows that the statute was so applied in the trial of the Counts X and XI herein, thereby depriving defendant of his rights under the Fifth and Sixth Amendments to the Constitution.

2. *Defendant was denied due process and a fair trial and his rights were substantially prejudiced by having been prosecuted, tried and punished for eleven violations, when his trial could lawfully have involved only two violations of the False Claims Act.*

The court below held that the inclusion of the nine barred counts, as issues upon the trial, the submission of those barred counts to the jury, and the admission of evidence relating to those counts did not substantially prejudice defendant in a trial which could validly involve only the remaining two counts. This decision, which construes and applies the Constitution, the False Claims Act and the "Harmless Error" statute, is of general importance in the administration of criminal justice in the federal courts.

The court below based its holdings on two grounds, first that all of the evidence actually introduced at the trial would have been admissible in a trial limited to the last two counts of the indictment; and second, that the issue actually submitted to the jury was in fact the same as it would have been if only the last two counts had been submitted (R. 277-278).

In so holding, we submit, the court below ignored the following prejudicial errors which were, in fact, committed:

A. The first nine counts contain specific allegations of prejudicial matter which are entirely lacking in the remaining two counts. Those two counts merely charge that defendant in 1946 falsely stated that he had never been a member of the Communist Party and had never used the name Tony Whales, whereas he was in fact a member of

the Communist Party in 1940 and 1941 and had in fact used the name Tony Whales in the Communist Party. Apart from the repetition in the first nine counts of the same or similar charges, itself of prejudicial effect in the trial of the last two counts on the issue of knowledge and wilfulness, Counts III and IV charge that defendant falsely stated that he had never contributed any services to or participated in the activities of the Communist Party, whereas he did in fact counsel and advise Communist Party members and recruits "with respect to methods to be employed in infiltrating divers groups and societies for the purpose of creating Communist Front organizations" (Counts III and IV (e)); "to sow resentment and discontent among Negroes by agitating the question of racial discrimination, to the end that members for said Party might be thus recruited" (Counts III and IV (h)); "concerning a plan, policy and program of said Party having for its purpose (1) disintegration of the morale of the Military Forces of the United States; (2) teaching the principles of Communism to men in said Military Forces; and (3) recruiting members for the Communist Party from the ranks of said Military Forces to the end that the Communist Party might gain control thereof and thus bring about a revolt against the Capitalist System." (R. 6-9, 36-38, see also Counts VII and IX, R. 12-13, 15-16, 38-39). Had the trial court dismissed the first nine counts before trial, as the court below now says was required, none of these charges would have been included in the indictment or submitted to the jury. Such charges are so highly prejudicial and defamatory that they constitute civil libel *per se*, as placing the accused "beyond the pale of respectability and making him a symbol of public hatred." *Spanel* v. *Pegler*, 160 F. 2d 619, 622 C. C. A. 7th (1947) (citing cases); *Mencher* v. *Chesley*, 75 ~~(D. C. D. C., June 27, 1947, unreported). Here, the trial~~ N. E. 2d 257 (N. Y. October 16, 1947); the refusal of a wit-

ness before a Grand Jury to answer such charges in the form of questions may be sustained on the basis of the privilege against self incrimination. In re *Costello*, (D. C. D. C., June 27, 1947, unreported). Here, the trial court instructed the jury to consider all the counts of the indictment, quoting verbatim all the prejudicial and inflammatory matters alleged in the first nine counts (R. 36-9, 43). If it is prejudicial and reversible error for the trial court to submit to the jury charges involving the "small dishonesties of trade" which had been abandoned without calling the attention of the jury to the fact of such abandonment (*Nash* v. *United States*, 229 U. S. 373, 379-380 (1912)), it is infinitely more prejudicial for the trial court, as it did here, to submit to the jury charges involving highly inflammatory and prejudicial matters which were not only abandoned in part [22] but were totally barred, under instructions to consider it all.

B. Evidence of other irrelevant crimes was erroneously admitted. The court below held that the evidence admitted under the barred counts relating to defendant's speeches in 1940-41 was consistent with the policies of the Communist Party and therefore admissible under the disputed issue of membership in the party under Count X (R. 277). Such evidence included testimony that defendant had spoken to a meeting sponsored by the National Negro Congress advocating a Communist revolution "now" and, at another time,

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[22] The government contends that Counts III and IV (e) and (h) were abandoned. In its brief in the court below, it stated "Appellant is in error that the government introduced evidence that defendant had counselled and instructed Party members to infiltrate groups and societies, particularly the National Negro Congress, for the purpose of creating Communist front organizations and to sow resentment and discontent among Negroes by agitating the questions of racial discrimination in order to recruit Party members. No such testimony appears in the record." (Brief for Appellee, p. 37.) The trial court did not call the fact of such abandonment to the attention of the jury.

had called upon Communists to infiltrate the armed forces, disintegrate their morale, take over the Army and overthrow the capitalists (R. 104, 116). Since there is no evidence whatsoever in this record as to any policy of the Communist Party advocating any of the above acts, and proof of such advocacy by the Communist Party has not been judicially established *Schneiderman* v. *United States*, 320 U. S. 118 (1943) (see Prettyman J., dissenting opinion in *N. M. U.* v. *Herzog*, (D. C. D. C. Civil Action No. 4874—'47, decided April 13, 1948, unreported)) such evidence does not tend to establish defendant's membership in the Communist Party. Such evidence, however, does tend to establish proof of other separate, independent crimes under the New York Criminal Anarchy Act, the Seditious Conspiracy Act and the Alien Registration Act, 1940. It is uniformly held to be reversible error to admit proof of other separate and independent crimes upon a trial of the crimes charged in the indictment, because of the prejudicial effect of such proof on the jury.[23] Exceptions are permitted where the evidence is admitted to prove a motive or intent, under a statute where intent or motive is an essential element.[24] Even here, however, the jury must be instructed to consider the evidence of such other crimes only upon the issue of intent.[25]. The False Claims Act, however, is a statute in which motive or intent is not an essential element. Its legislative history shows that purpose and intent, which were essential ingredients in the statute prior to 1934, were deliberately and intentionally eliminated by amendment in that year, and the statute now punishes false statements regardless of pur-

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[23] *Boyd* v. *United States* 142 U. S. 454 (1891); *Kempe* v. *United States* 151 F. 2, 680 C. C. A. 8 (1945); *United States* v. *Modern Reed & Rattan Co.* 159 F. 2d 658 C. C. A. 2 (1947), cert. denied 331. U. S. 831.

[24] *Wood* v. *United States* 41 U. S. 341 (1842) *United States* v. *Fawcett*, 115 F. 2d 764 C. C. A. 3 (1940).

[25] *Boyd* v. *United States* 142 U. S. 454 (1891) *Orloff* v. *United States*, 153 F. 2d 292 C. C. A. 6 (1946).

pose or intent.[26] In any event, even if such evidence was admissible on the issue of motive or intent, the trial court failed altogether to instruct the jury as the limited purpose for which it could consider the evidence. That court, having denied defendant's motion to dismiss the first nine counts and having admitted the evidence of such other crimes under the allegations of those counts, was in no position to give such a charge and, in fact, instructed the jury to the contrary. Under the court's ruling as to the first nine counts, defendant was likewise precluded from requesting such a charge.

It is one thing to admit evidence establishing that defendant committed a crime under an allegation of an indictment that he falsely denied having committed the crime; it is quite another matter to sustain the admission of that evidence of the other crime, when the inclusion of allegation in the indictment is held on appeal to have been erroneous and erroneously submitted to the jury, and the evidence is irrelevant to the issues properly on trial.

Under these circumstances, the admission of the evidence in question, which tended to establish that defendant had committed other separate and different crimes under other Federal and State laws from those in the two timely counts for which he was validly on trial under the False Claims Act constituted substantially prejudicial error, warranting reversal and a new trial.

Similar considerations apply to the admission of evidence that defendant had counselled Communist Party members to infiltrate organizations for the purpose of creating Communist front organizations and to sow resentment and discontent among Negroes in order to recruit Party members. In its effect upon the jury, such evidence is so highly

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[26] *United States* v. *Gilliland* 312 U. S. 86, 93-94.

prejudicial to defendant as clearly to fall within the reason for the rule prohibiting proof of other crimes.

C. Defendant's nine statements to the F.B.I. and the Commission in 1942-1943, under the nine barred counts, constituting proof of nine separate crimes, were erroneously admitted. These statements are the same, in Counts I, V, VI, and VIII, similar in Counts II, III, IV, or *arguendo*, consistent in Counts VII and IX, with defendant's statements to Panuch in 1946, admitted under Counts X and XI. But, "Each count of the indictment charges an offense different from the others either from a standpoint of time when the alleged false or fraudulent statements were made or with respect to different governmental agencies." On this ground, the trial court denied defendant's motion to dismiss the indictment as violating the Fifth Amendment by charging the same offense in a multiplicity of counts (*United States* v. *Marzani*, 71 Fed. Supp. 615, 618 (1947)). The court below has brushed aside the plain fact of the separateness of the nine statements charged in the nine barred counts from those charged in the remaining two, by arguing that since the earlier statements were the same or similar to the later statements, and the only issue was the truth or falsity, of the statements, the issue actually submitted to the jury on the trial of the eleven counts was the same as it would have been if only the last two counts had been submitted.

One trouble with this argument is that the statements may have been the same but the crimes were different. If the court below is correct, the trial court should have granted defendant's motion to dismiss the indictment on the constitutional ground of double jeopardy, or have required the prosecution to elect or have appropriately charged the jury, or have sentenced the defendant only on the timely counts. Its failure in these respects would, therefore,

constitute reversible error. *Braverman* v. *United States*, 317 U. S. 49 (1942); *Kotteakos* v. *United States*, 328 U. S. 752 (1946); *Cain* v. *United States*, 19 F. 2d 472, 476 (1927); *Patrilo* v. *United States*, 7 F. 2d 804 (1925).

Another trouble with the argument is that the issue submitted to the jury on the trial of the eleven counts was not the same as the court below thought it would have been on the last two counts. The difference is immediately apparent from the trial court's statement of the issue on eleven counts to the jury and the issue as the court below conceived it, after holding that the first nine counts were barred. The court below held that "The *truth or falsity* of the statements was the only issue" [27] (R. 278). The trial court told the jury "The simple issue here involved is whether or not the defendant *knowingly, wilfully and feloniously made false and fraudulent answers* to the questions asked of him" [28] (R. 43). The actual issue thus submitted to the jury was not merely whether the 1946 statements were true or false, but whether those statements were true or false, *and if false, knowingly, wilfully and feloniously made.* And this is the test under the statute.

Under the trial court's instructions, the jury must necessarily have been heavily influenced in reaching its verdict on the oral, informal and unsworn statements under the last two counts, with respect to the crucial issue of knowledge and wilfulness, by the admission in evidence of the documented, formal and sworn statements under the nine barred counts, particularly in the light of the array of witnesses who were summoned to identify the proof of the nine earlier statements. It is conceivable, indeed probable, that with the evidence of the 1942-1943 statements before it, the jury concluded that appellant, having lied on

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[27] Italics supplied.

[28] Italics supplied.

previous occasions under oath, was a chronic and consistent liar on this very subject, and, therefore, *knowingly* and *wilfully* lied in his unsworn statements to Panuch in 1946. The question is not whether the jury was right in its judgment regardless of the error in the admission of the 1942-43 statements, or their effect upon the verdict, but rather what effect the error had, or may reasonably be taken to have had, upon the jury's decision, the test being the impact of the error on the minds not of the appellate judge but of the jurors in the total setting. *Kotteakos* v. *United States, supra.* That the admission of the earlier statements constituted prejudicial error is not logically excluded by the argument that "if (the statements) were false in 1946 they were false in 1942, and vice versa" upon which the court below rested its holding that the admission of the 1942-43 statements were not prejudicial to appellant. For the jury could reasonably have found that the statements in the last two counts, had the trial been limited to those two counts, were false, but not knowingly and wilfully made, in the light of the informal nature of the conference in which they took place, whereas, on the trial of the eleven counts, it may reasonably have concluded that since appellant had lied under oath nine times before, he knowingly and wilfully lied twice afterwards, in his unsworn discussions with Panuch. In the total setting of the trial of eleven counts, this may reasonably be taken to have led the jury to a verdict of guilty on all counts, whereas, had the trial been on the last two counts alone, there is a reasonable possibility that the verdict would have been otherwise. The difference is between (1) the logical necessity which the Court assumes from the fact that the 1946 statements were the same or substantially similar to those made in 1942-43, the proof of the falsity of both sets of statements being the same, and (2) the impact on the minds of the jury of the prior sworn and formal statements when it came to its

deliberations as to the later informal and unsworn statements.

The resulting prejudice arose not merely because of the effect of the earlier statements on the trial of the statements under the last two counts on the issue of knowledge and wilfulness but also because the earlier statements themselves constituted an indispensable part of the proof of nine separate other crimes under the same statute for which defendant was not validly on trial. For reasons indicated above, proof of such other crimes is not admissible under the False Claims Act, or, if admissible, requires instructions to the jury as to the purpose for which such evidence may be considered. Here, the appropriate instructions were not and, under the trial court's erroneous ruling, could not have been given. Instead, the trial court instructed the jury to consider all the evidence on all counts, including defendant's statements in the barred counts, which went to establish that defendant was not only a chronic and consistent liar, but a criminal liar as well. Under these circumstances to hold, as did the court below, that the admission of the nine statements under the barred counts was beneficial rather than prejudicial to defendant in a trial which should have been limited to the remaining two counts is to ignore the fact that the admission of those statements may have decisively and prejudicially affected the verdict on the last two counts.

D. Defendant was erroneously sentenced. The court below upheld the general sentence of one to three years' imprisonment imposed by the trial court on the jury's separate verdict as to each of the eleven counts of the indictment, on the ground of the rule in *Claasen's* case, that in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence

on the good count only [29] (R. 281). The record here, however, shows that the trial court thought that each of the eleven counts charged a separate, distinct and valid offense. The trial court, therefore, must necessarily have imposed its general sentence on the basis of eleven separate convictions, as found by the jury, not on the basis of the only two which could validly have been found. In *Claasen's* case, the court mentions the fact that "the record does not show that any of the instructions at the trial were excepted to." Here, the record shows that defendant moved to dismiss the first nine counts of the indictment before, during and after trial (R. 20, 31, 46), and that the trial court's denial of the motion was error. Under these circumstances, the rule in *Claasen's* case is not applicable. *Dwyer* v. *United States,* 170 Fed. 160, 166, C. C. A. 9 (1909). On the record, it cannot be determined what part of the sentence is attributable to the verdict on the barred counts, the remaining two counts, or any of the counts separately. It cannot, however, be fairly assumed that the trial court would have imposed the same penalty for two violations of the applicable statute as for eleven separate violations which included those two. The rule in *Claasen's* case was designed to avoid a miscarriage of justice. Its arbitrary application in this case succeeds only in achieving the opposite result.

The trial court's error in denying the motion to dismiss the first nine counts of the indictment permeated the entire trial. It permitted the jury to find defendant guilty of nine separate violations of the False Claims Act for which he was not validly on trial; to consider irrelevant and prejudicial evidence, including proof of other violations of other State and Federal laws and prejudicial matter, in the nature of crimes, which were not validly included in the indictment; and to conclude, on the basis of evidence which should not

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[29] *Claasen* v. *United States* 142 U. S. 146 (1891).

have been admitted, that defendant had knowingly and wilfully made false statements when, had the error not been made, the jury might have well found otherwise. It prevented the defendant from objecting to irrelevant evidence and from requesting precautionary instructions. It led the judge to misdirect the jury and to impose a sentence on counts which were not properly on trial.

In the total setting of this case, these errors cannot be dismissed as harmless. The evidence against defendant is not so strong or overwhelming that any reasonable jury, had there been no error, could not have reached a different verdict. Of the three chief witnesses for the prosecution, one was a self-confessed perjuror (R. 117-120, 129-139), the second a former member of the Communist Party, whose testimony was in conflict in material respects (R. 70, 71, 78, 127-128) with that of the third witness, a police spy and *agent provocateur* (R. 88-89), whose testimony is subject to serious reservations as to its reliability, cf. *Colyer* v. *Skeffington*, 265 Fed. 17, 69 (D. C. Mass. (1920)). Defendant did not admit his guilt but took the stand to deny it vigorously in every material respect. Under these circumstances, we submit, the permeating error of the trial court substantially and prejudicially affected the verdict. *Kotteakos* v. *United States, supra.*

3. *Defendant was denied due process and a fair trial by the trial court's failure to treat the predominantly Negro jury as a representative jury.*

We have earlier summarized the evidence in support of our contention, overruled by the court below, that the trial court excluded relevant, competent, material and important evidence, involving Negroes and Negro organizations, solely because of the supposed inability of the predominantly Negro jury in the case to weigh such evidence on the same

terms as any other representative jury. It is clear that the application of such a test violates defendant's rights under the First and Sixth Amendments to the Constitution. For some seventy years, this Court has held in a variety of circumstances that the systematic exclusion of Negroes from grand and petit juries solely on the ground of race or color constitutes a denial of constitutional rights to the defendant. *Patton* v. *Mississippi*, 332 U. S. 463 (1947). For similar reasons, this Court condemned the systematic exclusion of wage earners (*Thiel* v. *Southern P. Co.*, 328 U. S. 217 (1946)) and women (*Ballard* v. *United States*, 329 U. S. 187 (1946)) from jury lists. It follows inescapably, we think, from this Court's insistence that the constitutional guarantee requires the selection of a "representative" jury, without exclusion because of race, color, economic status or sex, that, once properly selected, the jury must be treated throughout the trial as a representative jury.

In this case, the trial court failed so to do. To the extent that the limitations which it imposed upon the admissibility of evidence are not justified by the ordinary rules of evidence, they are erroneous without regard to the motives of the trial court. Such limitations were imposed on defendant's direct examination with respect to the incident involving police brutality against Negroes, and, in part, upon the cross examination of the chief prosecution witness, Drew, which was aimed at impeaching his credibility by exploring his activities, testified to on direct, as a police spy and *agent provocateur* in the National Negro Congress. *Alford* v. *United States*, 282 U. S. 687, 694 (1931); *Simon* v. *United States*, 123 F. 2d 80, 85, C. C. A. 4 (1932), cert. denied 314 U. S. 694; *Lindsey* v. *United States*, 77 App. D. C. 1, 133 F. 2d 368 (1942). To the extent that the limitation of Drew's testimony was subject to the trial court's

discretion, the race and color of this particular jury was an improper basis for the exercise of that discretion. *Hurtado* v. *California*, 110 U. S. 516, 555 (1884). The Constitution does not sanction a distinction among jurors on the basis of race or color. We submit that the trial court's failure to treat the jury as a representative jury is contrary to the public policy of the United States and as such should be corrected by this Court in the exercise of its supervisory powers over the Courts of the District of Columbia. *Hurd* v. *Hodge*, — U. S. — decided May 3, 1948.[30]

Conclusion

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

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May 22, 1948.

[30] See "To Secure These Rights", Report of the President's Committee on Civil Rights (1947) pp. 87-95.

APPENDIX

Criminal Code—

Sec. 6. *Seditious Conspiracy.* If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder or delay the execution of any law of the United States, or by force to seize, take or possess any property of the United States, contrary to the authority thereof, they shall each be fined not more than $5,000 or imprisoned not more than six years, or both (U. S. C. Title 18, Sec. 6).

Sec. 35 (A). *Presenting false claims.* Whoever shall make or cause to be made or present or cause to be presented for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both (U. S. C. Title 18, Sec. 80).

Alien Registration Act, 1940—

Sec. 9 (A). It shall be unlawful for any person, with intent to interfere with, impair or influence the loyalty

morale or discipline of the Military or Naval forces of the United States.

(1) To advise, counsel, urge or in any manner cause insubordination, disloyalty, mutiny or refusal of duty by any member of the Military or Naval forces of the United States. . . .

Sec. 10. (A). It shall be unlawful for any person (1) to knowingly and wilfully advocate, abet, advise or teach the duty, necessity, desirability or propriety of overthrowing or destroying any government in the United States by force or violence or by the assassination of any officer of any such government. . . . (U. S. C. Title 18, Secs. 9-10).

Judicial Code—

Sec. 269, Amended. . . . On the hearing of any appeal, certiorari, unit of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties (U. S. C. Title 28, Sec. 391).

New York Anarchy Act—

Sec. 160. *Criminal Anarchy defined.* Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of the government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

Sec. 161. *Advocacy of Criminal Anarchy.* Any person who:

(1) By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence or by assassination of the head or of any of the executive officials of government or by any unlawful means; or

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(4) Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

Sec. 162. *Assemblages of Anarchists.* Whenever two or more persons assemble for the purpose of advocating the doctrines of criminal anarchy, as defined in Section one hundred and sixty, such an assembly is unlawful and every person voluntarily participating therein by his presence, aid or instigation, is guilty of a felony . . . (New York Penal Law, Sec. 160-162).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

CARL ALDO MARZANI
Petitioner,

vs.

UNITED STATES OF AMERICA

No. 816

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE PETITIONER

Pursuant to Paragraph 4(a) of Rule 28 of the Revised Rules of this Court, petitioner submits this Reply Brief in reply to the Brief in Opposition for the United States:

1. In its Brief, the Government does not deny that the questions raised by petitioner are of general importance in the loyalty program, in the administration of criminal justice in the federal courts, and in connection with the supervision of this Court over the Courts of the District of Columbia. Its sole ground for opposition is that on the facts and rulings in this particular case, petitioner's contentions present no question of merit which requires this Court's examination (Gov't. Br. p. 29), and therefore, pre-

sumably, the questions of general importance raised by petitioner are not reached.[1] Under these circumstances, this reply brief is primarily limited to meeting the government's contentions on the merits of this case.

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[1]In its anxiety to avoid a review of this case, the government seeks to minimize a genuine conflict between the decision of the court below and the decision of the Court of Appeals for the Second Circuit in *Gottfried* v. *United States,* 165 F. 2d 360, 367-368, cert. denied March 29, 1948, with respect to the construction to be given to the Suspension Act, U. S. C. Title 18 Supp. V, 590 (a) (1) suspending the running of the statute of limitations applicable to certain offenses (Gov't. Br. p. 18). The court below decided this issue, correctly, we submit, in our favor, and we rest on that decision, predicating our claim of prejudicial error, in part, on the error found by the court below in the pertinent rulings and charge of the trial court.

The primary ground for the government's assertion that the decision in the *Gottfried* case is correct and that of the court below erroneous, with respect to the conflict, is that the legislative history of the suspension statute indicates a specific intent to have that statute apply to offenses under Section 35A of the Criminal Code, the provision here involved (Gov't Br. p. 18).

The legislative history of the Suspension Act and its application to Section 35A was exhaustively briefed by both sides in the court below (Br. for Appellant 9-38; Br. for Appellee 8-30; Reply Br. for Appellant 1-9). The only reference to Section 35A of the Criminal Code in this connection appears in Section 19(d) of the Contract Settlement Act 58 Stat. 649 which provides that "the provisions of Section 35A . . . shall apply to any statement, representation, bill, receipt, voucher, roll, account, claim certificate, affidavit or deposition made or used or caused to be made or used *for any purpose under this Act or any regulations pursuant to this Act* (italics supplied).

Section 19 (c) (1) of the Contract Settlement Act provides, in language similar to that of Section 35A, that "every person who makes or presents to any officer, agent or employee of any government agency any claim, bill, receipt, voucher, statement, account, certificate, affidavit or deposition knowing the same to be false, fraudulent or fictitious . . . for the purpose of securing or obtaining . . . any benefit, payment, compensation, allowance, loan, advance or emolument from the United States . . . in con-

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2. In answering petitioner's first contention that his conviction under Counts 10 and 11 of the indictment is constitutionally invalid, the government sets up a row of straw men, which it proceeds to demolish, without ever having faced the real adversary and coming to grips with it. The government states "Petitioner's first contention (Pet. 16-23) is that Counts 10 and 11 do not charge violations of Section 35A of the Criminal Code because the false statements in question were made informally and were not made under oath and were not stenographically transcribed. . . . Petitioner's argument is that his deception is not punishable because he was not first sworn and because there is no stenographic transcript of the conference." (Gov't's Br. 19, 21). This statement of our position is erroneous and misleading. Petitioner's contention does not go merely to the sufficiency of the indictment, nor is it limited to the specific grounds stated by the government. Our position is that the statute itself cannot be constitutionally applied to make criminal false statements uttered under all the circumstances shown in the trial of Counts X and XI, because, as those circumstances show, petitioner was denied the procedural safeguards which would have defined the crime, enjoined the obligation, and provided suitable notice of criminal consequences, which this Court held in *United*

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nection with the termination, cancellation, settlement, payment, negotiation, renegotiation, performance, procurement, or award of a contract with the United States . . ." shall be subject to specified civil liabilities, based in part on the pecuniary loss sought to be imposed on the United States.

In the case at bar, the trial court correctly charged the jury that "pecuniary or monetary loss is not an element of the offense, so that the government is not required to prove that the government suffered a pecuniary loss in connection with the offense here charged" (R. 41).

States v. *Gilliland*, 312 U. S. 86, 91 (1940) are required to save the statute from the objection of unconstitutional indefiniteness. Petitioner's claim as to the invalidity of the conviction under Counts 10 and 11 rests, therefore, not merely on the ground that the statements were informal, unsworn, and not recorded, but on the whole congeries of these and other factors, noted in our Petition pp. 9-10, 18-20, which conclusively demonstrate, we submit, that the statute as applied did not, as constitutionally required, adequately and under definitely ascertainable standards of guilt, inform petitioner that his statements, if false, would be criminal.

The *Zavala*[2] case, which the government cites (Gov't. Br., p. 21) to demolish the straw man of an oral and unrecorded statement, makes petitioner's contention even clearer. In that case, defendant presented to a customs inspector a written baggage declaration in which he omitted to state that he was bringing in any currency. Having been given an opportunity to amend his declaration, he caused it to be amended by authorizing the customs inspector to add a false statement to the declaration. In the course of the examination of defendant and his baggage, one of the government agents said to him "There is a law which has been enacted, a Presidential proclamation of April 6, 1940 which prohibits the bringing in of currency into the United States of any denomination, either this country or foreign, without first declaring it, so that it can be run through the Federal Reserve Channels to be checked. If you do not declare your currency, all of it, you will be prosecuted, according to the violations and the penalties

[2]*United States* v. *Zavala*, 139 F. 2d 830, 831 C. C. A. 2 (1944).

set forth in this Presidential proclamation" (139 F. 2d 829-830). The matter was one within the jurisdiction of the United States, the court held, by virtue of General Ruling 6A, Executive Order 8389, and the Trading with the Enemy Act, which covered the importation of currency into the United States (id. 832).

In the case at bar, there was nothing comparable in the circumstances of the Panuch interview, either in regulations or the equivalent offered which suitably informed petitioner of the matter within the jurisdiction of the United States or the criminal consequences involved.

Similarly, the statute as applied in the *Spivey* case[3], cited by the Government (Gov't. Br. Mimeo., p. 21, ftn. 10) punished false and forged statements made on Commodity Credit Corporation cotton producers' notes on which defendant secured credit through private banks, which assigned the notes, believing them genuine, to the Commodity Credit Corporation. There, the false statements were made to defraud an agency of the United States of money and, as the facts indicate, the applicability of the statute to bring home to defendant the particular matter within the jurisdiction of the United States and the criminal consequences involved was never seriously in question (109 F. 2d 183, 184-185).

The government is in error, therefore, in contending that "each of the elements of the offense as described by Section 35A is indisputably present in the case at bar." (Govt's Brief pp. 20-21). The undisputed and conceded facts as to the private, informal and unregulated nature of the interview with Panuch disclosed a situation which nega-

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[3]*United States* v. *Spivey*, 109 F. 2d 181, C. C. A. 5 (1940) cert. denied 310 U. S. 631.

tived the formality of the charge in the indictment, failed to put petitioner on notice that the interview had risen to the dignity of a matter within the jurisdiction of the United States, and provided no basis for the jury, on the issue of knowledge and wilfulness, to pass on the constitutional issue involved which had been ruled on by the trial court and withdrawn from the jury (R. 22, 25, 40).

The second ground on which the government seeks to uphold the decision of the court below is that, in applying the statute to the facts of this case, it has not sought to prosecute for false statements made by one government employee to another in a casual conversation, where the urgent necessity of truthfulness might not have been plain (Gov't. Br. p. 20). The government admits, however, that the interview was not in conformity with any regulations which provide for the hearing of charges against employees, (id. p. 22 ftn. 11); that petitioner did not seek a formal hearing (id. p. 22) but sought and obtained a private conference (id. p. 22 ftn. 11) with Panuch, with whom he had "a good personal relationship" (id. p. 23) and that his statements were unsworn, unwitnessed and unrecorded (id. p. 21). The government does not deny that the only two participants addressed each other as "Carl" and "Joe" throughout the conference; that Panuch was not merely Deputy Assistant Secretary in charge of Administration but also petitioner's superior in channels (R. 176); that the interview was at petitioner's request and not required; that the conference was not a removal proceeding but a discussion about a request for a voluntary resignation; that the requirements of Civil Service Rule XII and Departmental Circular 222, if applicable, were not complied with or their equivalent offered; that petitioner's statements were voluntary and

made under no obligation which had been enjoined; that Panuch was without knowledge of the previous interrogations on the same subject matter by the F. B. I. and the Commission; that the conference ranged over a wide variety of topics and lacked all the indicia of a hearing on a matter within the jurisdiction of the United States as provided by the Regulations of the Loyalty Review Board of the Hearing Procedures of the State Department (Pet. 9-10, 17-20). Nothing in the interview compared with the circumstances surrounding the false statements in the *Zavala, Spivey* (supra) or other cases cited by petitioner, in which the statute has been upheld (Pet. 22 ftn. 21).

The government rests its contention that the conference was not a casual one on the ground that Panuch, who had authorized the request for petitioner's resignation, regarded the matter seriously and testified that "the conference was in the nature of an appeal, the man was appearing before me as Deputy Assistant Secretary and he was entitled to have his day in court" (Gov't. Br. p. 23).

Panuch is an attorney (R. 58). Petitioner is not. Aside from the fact that Panuch's characterization of the interview was not communicated to petitioner at the time, but was reserved for testimony at the trial, it is apparent that Panuch did not regard the matter seriously enough to find out about or have before him a record of the prior proceedings, which, presumably, constituted the basis of the "appeal"; to advise petitioner of the charges in advance, although a month elapsed between the request for the resignation and the interview, the date and place of which was fixed by Panuch (R. 48); to have other State Department officials or even a stenographer present; to advise petitioner of his rights; to conduct the interview with formality;

to reduce the interview to writing; or otherwise to afford petitioner what a lawyer would normally regard as the requirements of "a day in court", if he was serious about the matter. That petitioner was "capable" of knowing that Panuch's inquiries related to a matter within the jurisdiction of the Department (Gov't. Br. p. 24) is no substitute for the fact that petitioner was not, as was his right, actually and adequately informed that his statements, if false, were on a matter within the jurisdiction of the United States punishable under the statute.

The government apparently construes the statute as if it exempted false statements made in casual conversation but punished such statements if made in serious conversation. The court below construes the statute to apply to any false statements, casual or serious, but holds that the statute meets the test of constitutional definiteness because the discussion in this case was "official". There is nothing in the statute, we submit, which warrants these distinctions.

The holding of the *Gilliland* and the other cases cited by petitioner (Pet. 22, ftn. 21) requires that false statements to be punishable, must be made in a particular matter within the jurisdiction of the United States, and that matter must be brought home to petitioner under regulations or their equivalent which provide suitable notice of the criminal consequences involved, under definitely ascertainable standards of guilt. By equating "serious" or "official" to the language of the statute, the government and the court below have given the statute a novel and unwarranted construction which requires decision by this Court.

3. The government's answer to the petitioner's second contention (Pet. 23-33) is limited to a partial and, we sub-

mit, insubstantial justification of the decision of the court below.

A. The government does not deny that the nine barred counts contained prejudicial and inflammatory matter which would not have been submitted to the jury, had the trial court ruled correctly with respect to the statute of limitations. The government does not recede from its previous position that some of these matters had been abandoned, or deny that the trial court failed to instruct the jury as to the fact of such abandonment, or question the applicability of the holding in the *Nash* case[4] (Pet. 23-25).

B. Nor does the government deny that certain of the evidence admitted under the barred counts constituted proof of other separate crimes under other Federal and State laws or was of such a nature as to be as prejudicial in its effect upon the jury as proof of other crimes (Pet. 10-11, 25-28). Its sole support for the ruling of the court below on this issue is that such evidence was relevant to membership in the Communist Party, was not received only in respect of any of the first nine counts, and, was therefore admissible to prove the crime charged in Count 10 even though it proved other crimes as well (Gov't. Br. p. 25, ftn. 12).

The government cites the *Krulewitch*[5] case as its authority. But that case involved a prosecution for transporting a woman in interstate commerce, for the purpose of prostitution, under the White Slave Traffic Act (Cr. Code 37, 18 U. S. C. A. Sec. 88, 398-399) where purpose and

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[4]*United States* v. *Nash*, 229 U. S. 373, 379-380 (1912).
[5]*United States* v. *Krulewitch*, 145 F. 2d 76 C. C. A. 2 (1944).

intent were essential elements of the crime. And, even in that case, under that statute, the court held that the admission of evidence of the separate crime of rape constituted prejudicial and reversible error, (145 F. 2d 80) even though the trial court carefully instructed the jury as to the use to which it might put such evidence (id. 81).

In the case at bar, two pertinent facts stand undenied: first, that purpose or intent is not an element of the statute here involved; and second, that the record is barren of any evidence of prohibited advocacy by the Communist Party, constituting proof of other separate crimes (Pet. 26-27). Consequently, evidence that petitioner engaged in such prohibited advocacy is not relevant to prove that he was a member of the Communist Party; such evidence of other crimes is not admissible on any issue of intent; and, in any event, the trial court failed to instruct the jury to consider such evidence only on the issue of intent. The evidence was admitted under specific allegations of the indictment which the court below held were not validly included in the trial. If relevant at all, such evidence was relevant only to such counts, and not to prove other irrelevant crimes. The dictum of the *Krulewitch* case is not applicable. The government, we submit, has failed to meet petitioner's contention that the admission of this evidence of other separate crimes, under these circumstances, constitutes prejudicial error.

C. As to petitioner's contention that the admission in evidence of his nine statements to the F. B. I. and the Commission under the nine barred counts was prejudicial in the trial of the last two counts (Pet. 11-12-28-31) the government's answer is that assuming, *arguendo*, that such evidence would not have been admissible under the last two counts, the evidence was not hurtful to petitioner, but on

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the contrary beneficial and that "It is difficult to understand how evidence of such denials could possibly prejudice petitioner, unless and until the jury found that petitioner had been a member of the Communist Party and had used an alias. Once these findings were made, the jury could not very well have escaped a finding of guilt as to Counts 10 and 11" (Gov't. Br. p. 26).

This formulation of the problem presents, but does not justify the prejudicial error. For, once the jury had concluded that petitioner had lied in formal, sworn statements that he was not a member of the Communist Party and had not used an alias, under the first nine counts, which were not validly on trial, it is, indeed, probable that *for that very reason* it could not have escaped a finding that petitioner knowingly, wilfully and criminally lied about the same subject matter in his informal and unsworn statements under the last two counts.

The government's argument assumes either that advantages only accrued to petitioner from his nine earlier statements or that the jury weighed only his last two statements against the proof of his activities in 1940-1941, without reference to the fact that it had already found him guilty of nine separate crimes in the making of his nine earlier statements. These assumptions do violence to the reality by abstracting the last two counts from the total setting of the trial. The nine earlier sworn formal and documented statements *were* considered by the jury and must necessarily have had a prejudicial effect on the issue of petitioner's knowledge and wilfulness in the making of the unsworn, informal and unrecorded statements in the last two counts. Since the nine earlier statements were charged as, and constituted proof of nine separate crimes,

of which the jury found petitioner separately guilty, and proof of crimes is hardly beneficial to a defendant, it is sophistry to claim that only advantages accrued to petitioner from such evidence.

D. As to petitioner's contention that he was erroneously sentenced (Pet. 31-32), the government answers with *Pinkerton* v. *United States,* 328 U. S. 640, 641-642, which it asserts forecloses the argument (Gov't. Br. p. 27). But, in that case, the reported proceedings do not show that the question was raised in the court below or that the presumption of law—that the court awarded sentence on the good count only—was rebutted, as it was here, by the presence in the record of the ruling by the trial court that each of the eleven counts on which it imposed its general sentence constituted a separate, valid crime and by exceptions taken to erroneous instructions on the first nine counts in petitioner's motion for judgment of acquittal and new trial (R. 31, 46). The government's suggestion that petitioner's remedy is provided by Rule 35 of the Federal Rules of Criminal Procedure is beside the point. If the general sentence on eleven counts was error, this Court may correct the error. Cf. *Braverman* v. *U. S.,* 317 U. S. 49 (1942). *Dwyer* v. *United States,* 170 Fed. 160, 166, C. C. A. A. (1909). Rule 35 is addressed to the discretion of the trial court and does not foreclose the assertion of a right.

4. The government's answer (Gov't. Br. pp. 27-28) to petitioner's final contention that the trial court failed to treat the predominantly Negro jury in the case as a representative jury is a mere restatement of the opinion of the court below which fails entirely to answer the specific errors asserted as to that opinion by petitioner (Pet. 12-16, 33-35).

The importance of the question is conceded, and, if, as we assert, the disputed rulings of the trial court were erroneous under the ordinary rules of evidence, they cannot be justified by the supposed inability of the predominantly Negro jury to consider the evidence on the same terms as any other representative jury. The question presented, therefore, is both a constitutional question and one which warrants the exercise by this Court of its supervisory powers over the Courts of the District of Columbia.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1948

No. 59

CARL ALDO MARZANI,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR PETITIONER

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Supreme Court of the United States

OCTOBER TERM, 1948

No. 59

CARL ALDO MARZANI,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals, dated February 2, 1948, appears at R. 272 and is reported at 168 F. (2d) 133. Its Opinion, dated April 22, 1948, denying petition for rehearing, appears at R. 292 and is reported at 168 F. (2d) 141. The opinion of the District Court, dated April 25, 1947, denying the motion to dismiss the indictment, appears at R. 20 and is reported at 71 F. Supp. 615.

Jurisdiction

The judgment of the Court of Appeals was entered February 2, 1948 (R. 282). A petition for rehearing was

denied on April 22, 1948 (R. 294). The petition for writ of certiorari was filed on May 22, 1948 and was granted on June 21, 1948 (R. 295). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. Section 374(a)) and the Rules of Practice and Procedure in Criminal Cases promulgated by this Court.

Statutes Involved

The False Claims Act (Section 35A of the Criminal Code, 18 U. S. C. 80, now 18 U. S. C. 1001) provides:

"Whoever shall make or cause to be made or present or cause to be presented for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or *whoever shall knowingly and willfully* falsify or conceal or cover up by any trick, scheme or device a material fact or *make or cause to be made any false or fraudulent statements or representations,* or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry *in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder,* shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(Mar. 4, 1909, c. 321, Sec. 35, 35 Stat. 1095; Oct. 23, 1918, c. 194, 40 Stat. 1015; June 18, 1934, c. 587, 48 Stat. 996; April 4, 1938, c. 69, 52 Stat. 197 italics supplied.)

Other relevant provisions of the statutes involved are set forth in the Appendix to Petitioner's Brief, pp. 1-3.[1]

Questions Presented

Petitioner was convicted of eleven separate criminal violations of the False Claims Act. The court below held that the prosecution on the first nine counts of the indictment was barred by the statute of limitations (R. 274-276, 277) but affirmed the judgment of the District Court on the grounds that no prejudicial error was committed and that the sentence, which was general, could be sustained on the remaining two counts, which it held good. The following principal questions are raised by the opinions:

1. Was the False Claims Act validly applied, consistently with the protection of petitioner's rights secured by the Fifth and Sixth Amendments to the Constitution and with the decision of this Court in *United States* v. *Gilliland*, 312 U. S. 86 (1941), to the prosecution under Courts X and XI for false statements by one government employee to another in the same government department, in a private discussion held pursuant to no law, rule or regulation, but initiated solely at petitioner's request for the purpose of asking his superior in the department why petitioner had been asked to resign, where such statements were not under oath, not witnessed, not stenographically transcribed, never reduced to writing, and not required to be made, where the only two participants in the conference

[1]Hereinafter cited as App.

addressed each other throughout by their first names and discussed a wide variety of other topics, where no suitable notice was given by regulation or otherwise of the consequences of knowingly and wilfully making any false or fraudulent statements and where the statute makes punishable such statements under no more definite or ascertainable standards of guilt than that they be made "in any matter within the jurisdiction of any department or agency of the United States?

2. Was petitioner deprived of his rights to due process and a fair trial under the Fifth and Sixth Amendments to the Constitution, and substantially prejudiced within the meaning of the applicable rule[2] statute[3] and decision of this Court in *Kotteakos* v. *United States,* 328 U. S. 750 (1946) by reason of the inclusion of the nine barred counts as issues upon the trial, the submission of those counts to the jury and the admission of evidence relating to those counts, in a trial which, the Court below held, could validly involve only the remaining two counts, where (1) the nine barred counts contained additional and different issues and irrelevant, prejudicial and inflammatory matter, not included in the last two counts, (2) the evidence admitted under the barred counts established proof of nine separate crimes under the False Claims Act, of other crimes under other Federal and State laws, and of other prejudicial matter in the nature of crimes, (3) such proof was not admissible on any of the issues in the trial of the last two counts, and (4) in any event, the trial court did not give the jury precautionary instructions as to the purpose for which such proof should be considered?

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[2]Fed. R. Crim. P., 52(a).

[3]Sec. 269 of the Judicial Code, as amended, 40 Stat. 1181 (1919), 28 U. S. C. A. Sec. 391 (1928) App. 1-2.

3. Was petitioner deprived of his rights under the Fifth Amendment to the Constitution by reason of the holding of the court below that the general sentence of one to three years imprisonment, imposed by the trial court, upon a verdict of guilty as to each of eleven separate counts, must be sustained, although nine of the counts were held on appeal to have been barred by the statute of limitations where petitioner's motion to dismiss these counts was preserved throughout the trial and the record otherwise rebuts the presumption of law applied in *Claasen's* case.[4]

4. Was petitioner deprived of liberty without due process of law and the right to an impartial trial by a representative jury, in contravention of his rights under the Fifth and Sixth Amendments, by reason of the application by the trial court of a unique test for the admissibility of evidence, based on the presence of nine Negroes on the jury, rather than a general standard applicable to any representative jury, and is the exercise of the supervisory power of this Court over the Courts of the District of Columbia properly invoked to correct the application of such a test?

Specification of Errors Assigned

Petitioner assigns as error by the Court below the affirmative answer to the first and the negative answers to the second, third and fourth of the foregoing questions.

Statement of Case

On January 17, 1947, petitioner was indicted in eleven counts for having made false and fraudulent statements in

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[4]*Claasen* v. *United States*, 142 U. S. 146 (1891).

matters within the jurisdiction of departments and agencies of the United States in violation of the False Claims Act (R. 2-19).

The first nine counts of the indictment charged that the petitioner, while employed by the Federal government, and in the course of authorized investigations as to his character and fitness, falsely stated to representatives of the Federal Bureau of Investigation in 1942 and to representatives of the Civil Service Commission in 1942 and 1943 that he had never been a member of, never attended meetings of, never contributed services to, and never participated in the activities of the Communist Party, never used the name Tony Whales, and never made any speeches against conscription. The falsity of each of these statements is alleged in numerous and detailed particulars in certain of the counts. The remaining two counts charged that in 1946 petitioner, while so employed, falsely stated to a duly authorized representative of the State Department that he had never been a member of the Communist Party and had never used the name Tony Whales. In these counts, a single specification of falsity is alleged as to each statement.

The first nine counts cite as authority for the investigations in which the alleged false statements were made "statutes, rules and regulations of the United States and Executive Orders of the President of the United States".

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No similar authority is cited in the last two counts. For convenience, the indictment is summarized in the footnote.[5]

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[5]

Count	Date of Statement	Nature of Statement	Number of Allegations as to Falsity	Investigation Made by Representative of	Authority Cited for Investigation	Petitioner Employed By
I.	July 29, 1942	Never a member of Communist Party	1	F.B.I.	Statutes, Rules and Regulations of the United States, and Executive Orders of the President of the United States	O.S.S.
II.	July 29, 1942	Never attended meetings of Communist Party	13	F.B.I.		O.S.S.
III.	July 29, 1942	Never contributed services to Communist Party	11	F.B.I.		O.S.S.
IV.	July 29, 1942	Never participated in activities of Communist Party	11	F.B.I.		O.S.S.
V.	Nov. 23, 1942	Never used the name Tony Whales	1	Civil Service Commission		O.S.S.
VI.	Nov. 23, 1942	Never a member of Communist Party	1	Civil Service Commission		O.S.S.
VII.	Nov. 23, 1942	Never made any speeches against conscription	2	Civil Service Commission		O.S.S.
VIII.	Apr. 20, 1943	Never used the name Tony Whales	1	Board of Appeals and Review of the Civil Service Commission		O.S.S.
IX.	Apr. 20, 1943	Never made any speeches against conscription	2	Board of Appeals and Review of the Civil Service Commission		O.S.S.
X.	June 1, 1946	Never a member of Communist Party	1	State Department	None	State Department
XI.	June 1, 1946	Never used the name Tony Whales	1	State Department	None	State Department

Before, during and at the close of the trial, petitioner moved to dismiss the indictment on the grounds, *inter alia*, that the statute, insofar as applicable to petitioner under the circumstances, was constitutionally invalid, because of indefiniteness, and that the first nine counts were barred by the statute of limitations (R. 20, 31, 33, 46). These motions having been denied by the trial court, the case was tried on all eleven counts, petitioner was found guilty on each count, and the court sentenced him generally to one to three years imprisonment on all eleven counts (R. 47).

Petitioner's Statements: In 1942, petitioner came to Washington and was employed by the Federal government in the Office of the Coordinator of Information and later in the Office of Strategic Services as a war service appointee, subject to a character and fitness examination. In the course of that examination, he was formally interrogated in 1942 by representatives of the F. B. I. and of the Civil Service Commission, and stated under oath that he was not and had never been a member of the Communist Party and that he had never attended its meetings, participated in its activities, contributed services to it, used the name Tony Whales or spoken against conscription (App. 19-23, 26, 44; R. 244-249; Tr. 116, 118-120, 159)[5a]. He was, nevertheless, rated ineligible for further responsible government employment. He appealed to the Board of Appeals and Review of the Commission in April, 1943, and in sworn testimony in a formal hearing before that Board, again stated that he had never used the name Tony Whales and had never made any speeches against conscription (App. 54-57, R. 249-250; Tr. 323). That Board in July, 1943 reversed the previous ruling and rated him eligible (App.

[5a]The reference "Tr." is to the original transcript of record certified to this Court by the court below.

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58-60). He continued as a civilian employee of the O. S. S. until inducted into the Army as a private. He was then reassigned, in military status, to his former position in the O. S. S. and after overseas service, was honorably discharged as a master sergeant (R. 173, 175). He remained in the employ of the O. S. S. and later of the State Department, to which his O. S. S. unit had been transferred. Having been requested, on April 30, 1946, to resign for security reasons, he sought an appointment with Panuch, Deputy Assistant Secretary for Administration, who was also his superior in the State Department, to ask an explanation, and to state his desire to resign but unwillingness to do so under fire (R. 178). At the ensuing meeting on June 1, 1946, between Panuch and petitioner, which was private and informal, petitioner again stated, in the course of a lengthy conversation covering a number of other matters, that he had never been a member of the Communist Party and had never used the name Tony Whales (R. 48-55). Thereafter, upon apparent assurances that his record was clear, petitioner resigned and entered private employment as a producer of films for labor unions (R. 59, 176-181, 202). Over a month after his resignation had been accepted, he was notified that he had been discharged from the State Department in the interest of the United States (Defendant's Exhibit No. 1, Government's Exhibit 18, App. 57, 63-64, 72).

Proof of the Falsity of Petitioner's Statements: The government introduced proof that during 1940-1941 when petitioner lived on the lower East Side of New York City and worked as an economics instructor at New York University, he was a member, organizer and educational director of a section or branch of the Communist Party; used the alias Tony Whales; attended numerous public and

private meetings of the Party; conducted study classes for it; spoke, under its auspices, against the Smith-Connally Bill, the Selective Service Bill, and other legislation; gave lectures on the principles of communism; advocated opposition to the entry of the United States into the war and the abolition of discrimination and segregation against Negroes; was active in assisting a branch of the National Negro Congress on the lower East Side; and performed such other services, and engaged in such other activities for the Party as collecting membership books and distributing tickets to a Soviet movie, then showing in New York City (R. 257-258, 260; 71-74, 82, 94-117, 121-122, 156-242).

Several matters arising from the conduct of the trial and the holdings of the court below require further statement to explain the basis in the record for the questions here presented. These matters are as follows:

The Interview with Panuch: The government concedes that the interview was requested by petitioner; that petitioner met and conferred privately with Panuch; that petitioner's statements were not under oath and not stenographically transcribed (Brief in Opposition to Petition, pp. 21, 22 R. 293.)[6] The government also concedes that the interview was not a formal removal proceeding, in conformity with regulations which provide for the hearing of charges against employees, but was instead a private conference to discuss Panuch's request that petitioner

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[6]The government stated in the court below "On June 1, 1946, pursuant to his request for an interview, defendant met and conferred privately with Mr. Panuch. Defendant was not under oath and the proceedings were not transcribed (Brief for Appellee p. 3.) (R. 47-55).

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voluntarily resign.[7] It is undisputed that Panuch and petitioner were the only participants in the discussion (R. 48); that Panuch was not merely Deputy Assistant Secretary for Administration but petitioner's superior in channels, with whom petitioner had a friendly relationship and whom he saw frequently in the course of business (R. 48, 176, 179); that they addressed each other by their first names throughout the interview (R. 49, 50); that the interview lasted over two hours, covered a wide variety of topics (R. 52, 293); and was not preceded by any notice of charges to which petitioner was given an opportunity to reply in writing; that Panuch had never heard of the previous interrogations by the F. B. I. and the Commission, the hearing before the Board of Appeals and Review of the Commission, or the rating by the Commission that petitioner was eligible for government employment, until petitioner told him about them at the interview (R. 51, 52); and that Panuch never made or filed any written record or memorandum of the interview (R. 55). There is no contention that the interview was regulated by any law, rule or regulation of the State Department or the Commission, or otherwise, which required petitioner to appear, answer questions, or make statements, or defined his obligations, or established any procedural safeguards, or gave

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[7] "It is idle to urge, as petitioner does, that the interview was not in conformity with regulations which provide for the hearing of charges against employees. Petitioner previously had had such hearings before the Civil Service Commission. . . . When he was requested to resign, he did not want or seek another hearing. Instead he wanted a private conference with the executive of the Department responsible for the request. (He) obtained precisely what he sought . . . (Brief in Opposition to Petition p. 22, ftn. 11) "He did not seek any formal hearing in an effort to have the request withdrawn." (Ibid p. 22).

him notice of the consequences of knowingly and willfully making any false or fraudulent statement. There is nothing in the record to show that this private, informal, unregulated discussion between two government employees was on the same level, or could reasonably be thought by petitioner to be of the same nature as the formal interrogations by the F. B. I. and the Commission or the hearing before the Board of Appeals and Review of the Commission, or had risen to the dignity of a "matter within the jurisdiction of the United States", as required by the statute.

The court below without adverting to the absence of pertinent laws or regulations, imposing such requirements and safeguards, held that the False Claims Act was applicable to false statements made under these circumstances because petitioner was engaged in "Official" discussions with his superior (R. 293). For reasons stated below this holding is assigned as error.

The Evidence Admitted Under the Nine Barred Counts of Other Crimes and Prejudicial Matter for which Petitioner was not Validly on Trial in the Last Two Counts:

1. The government's case as to the falsity of all of petitioner's statements charged as false in the indictment was limited to evidence of petitioner's activities in 1940-1941 in New York City. Included in such evidence was testimony tending to establish that petitioner was guilty of violations of the New York Anarchy Act (New York Penal Laws, Secs. 160-166, *Gitlow* v. *New York* 268 U. S. 652 (1925)), the Seditious Conspiracy Act (35 Stat. 1089, U. S. C. Title 18, Section 6 (1909), and the Alien Registration Act, 1940 (54 Stat. 670 U. S. C. Title 18, Secs. 9-17 (1940)), in that, in 1940, petitioner advocated, to a meeting sponsored by the National Negro Congress, a Communist revolution in the

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United States "now" (R. 116) and, in 1940, urged fellow-Communists that "now the young men in the Communist Party must get into the Army so that we can disintegrate the morale of the armed forces in order that the Communists may take over . . . overthrow the capitalists and also take over control of the Army" (R. 104). Such evidence was admitted under the specific allegations of Counts III(k) and IV(k) which allege such advocacy as proof of the falsity of petitioner's general statements to the F. B. I. in 1942 that he had never contributed services to or participated in the activities of the Communist Party (R. 5-9).

2. Also included in the evidence of petitioner's activities in 1940-1941 was testimony that petitioner had counselled and instructed Party members to infiltrate the National Negro Congress for the purpose of creating a Communist front organization and to sow resentment and discontent among Negroes by agitating questions of racial discrimination in order to recruit Party members (R. 74-78, 106-107, 112-113, 115-117) admitted under Counts III(e) and (h) and IV(e) and (h) (R. 5-9). In its effect upon the jury, such evidence is clearly as prejudicial as the proof of other crimes.

3. Other testimony was admitted, over objection, in connection with the proof under the first nine counts that petitioner had committed crimes, not charged in any count of the indictment, of false swearing to New York City welfare agents, or the WPA in 1939, about his financial condition, and family resources in connection with an application for relief (R. 49, 50, App. 26, 28, 33-37, 64-72) and of false statements to representatives of the Civil Service Commission in 1942, denying that his wife was a member

of the Communist Party (R. 49-50, 231, App. 26, 37-39). Petitioner's motions for mistrial and new trial based on the admission of this evidence were denied (R. 31, 46).

Petitioner contended to the court below that all of the foregoing evidence of crimes and in the nature of crimes was prejudicial and inadmissible in the trial of the last two counts, and, if admissible, was not safeguarded by the required precautionary instructions as to the limited purpose for which the jury might consider such evidence, without which its admission was prejudicial error.

The court below rejected petitioner's contentions. Insofar as it discussed the questions, it held that the evidence of petitioner's speeches admitted under the barred counts was admissible on the trial of the last two counts because such evidence was "consistent with (the) policies" of the Communist Party and therefore relevant upon the disputed issue of defendant's membership in the Communist Party under Count X (R. 277). There is no evidence whatsoever in this record as to the official advocacy by the Communist Party of revolution "now" the infiltration of the Army to overthrow the capitalists or the sowing of resentment and discontent among Negroes. The court rejected, *sub silentio*, petitioner's contentions that the admission of evidence of crimes not charged in any count of the indictment and the failure to give the required precautionary instructions with respect to all of the foregoing evidence were prejudicially erroneous. For reasons stated below, petitioner assigns these holdings as error.

To support each of the nine crimes charged in the first nine counts, the government introduced, as a part of its case in chief, documentary evidence of petitioner's sworn statements to the representatives of the F. B. I. in 1942

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and of the Commission in 1942 and 1943 (R. 244-254), identified by the stenographers who transcribed such statements and by the investigators who conducted the interrogations (Tr. 109-111, 116; 120, 125-126; 152, 154, 157; 194-195; 210, 216, 217-220; 227-228; 323).

That these nine statements constituted an indispensable part of the proof of nine crimes, each separate and distinct from the other, is clear beyond cavil. The trial court ruled that the statements were separate (R. 25-26). For having knowingly, willfully and falsely made them, petitioner was convicted of nine separate crimes.

Petitioner contended in the court below that it was prejudicial error to admit this evidence of nine separate crimes in the trial of the last two counts alone, because irrelevant to any of the issues there involved, and because, even if such evidence was admissible, the trial court failed to give the required precautionary instructions.

The court below, however, rejected these contentions, holding that the evidence was admissible in a trial of the last two counts, because the nine earlier statements were the same as or similar to the statements in the last two counts, and the nine statements were beneficial to defendant, rather than prejudicial, in that they showed that from a time close to the event, petitioner had consistently and undeviatingly maintained the same position (R. 277-278). For reasons stated below, petitioner assigns this holding as error.

The Trial Court's Failure to Treat the Predominantly Negro Jury as a Representative Jury and the Resulting Exclusion of Admissible Evidence Regarded as Too Prejudicial for This Jury to Consider:

The government's case as to the falsity of petitioner's statements was introduced through three witnesses (Hewitt,

Harper, Drew) who were Negroes. The subject matter of their testimony concerned in substantial part their own and petitioner's activities in connection with a branch of the National Negro Congress on the lower East Side in New York City in 1940 and 1942. Nine members of the jury which heard the case were Negroes. Petitioner is white (R. 70 et seq., 105 et seq., 254-255). These facts are not denied.

The effect of this combination of circumstances on the trial court's rulings is illustrated by the following three examples:

Harper testified that he had attended a Communist meeting at petitioner's home (R. 71-74, 76, 82). Petitioner sought to testify that the meeting was not a Communist meeting, and to identify the time and subject matter of the meeting by reference to an incident involving police brutality against two Negroes (R. 185-186). The trial court halted the testimony, held that the reference by petitioner to police brutality against Negroes had "other purposes", that "the prejudice has happened here" and that petitioner was significantly making use of such testimony to prejudice the jury (R. 186-189). Counsel for the government stated that "there could be no fair trial before *this* jury, if you go into the beatings" (R. 188, italics supplied) and announced the government's intention to move for a mistrial if the testimony persisted. The trial court thereupon limited petitoner's direct examination to avoid specific references to this incident of police brutality against Negroes (R. 188).

Drew, a member of the New York City Police Department, testified on direct examination, that pursuant to an official assignment, he had joined the Communist Party on the lower East Side as an undercover police agent, under a

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false name and with fictitious identifications, and had met and dealt with petitioner as a fellow Communist (R. 88-90, 92-117, 120-122). Included in Drew's direct examination and in the examination of Captain Gallagher, his superior officer in the Police Department, were incidental references to the fact that Drew had been assigned to investigate the National Negro Congress (R. 64-67, 70, 106) but that finding no branch of this organization on the lower East Side, he had created such a branch, solicited members for it, chaired its meetings, written pamphlets for it, become the head of it, spread its influence, sought the guidance of the Communist Party for it, and simultaneously reported on the activities of the organization and its members to the Police Department (R. 89-91, 106, 111-115, 117, 121, App. 61). Some of this testimony referred to events at which petitioner was not asserted to be present. Petitioner sought to cross examine as to all these activities to establish Drew in his setting as a police spy, to impeach his credibility and to show his bias, interest and misconduct as an *agent provocateur*. The trial court halted such cross examination, limited it to meetings where both Drew and petitioner were present, about which there had been testimony, curtailed cross examination as to credibility, even though Drew's testimony was largely uncorroborated and forbade certain questions altogether (R. 123-126, 105).

Captain Gallagher testified that the National Negro Congress was one of the "subversive" organizations which he had assigned for investigation (R. 64-66, 70). Harper, as well as Drew, testified about petitioner's activities on behalf of the National Negro Congress (R. 74-76, 83-84, 86, App. 60). Petitioner sought to cross examine both Harper and Drew as to the objects of the National Negro Congress to show that it was not "subversive" and that petitioner's

concern with it was in connection with non-subversive objects. The trial court refused to permit such cross-examination (R. 79-81).

Petitioner contended in the court below that all of the foregoing evidence was admissible, that the trial court excluded it solely because of its apprehension that the predominantly Negro jury could not consider the evidence on the same terms as any other representative jury, and that thereby petitioner was unconstitutionally denied due process and a fair trial before a representative jury.

The court below rejected petitioner's contentions and held that all of the rulings were correct and would have been the same regardless of the racial composition of the jury (R. 280). For reasons stated below, petitioner assigns these holdings as error.

Summary of Argument

I. The court below erred in upholding the judgment in Counts X and XI, because the False Claims Act is inapplicable to those counts, and, if applicable, is invalid because of indefiniteness.

A. The court below held the False Claims Act applicable, in the trial of those counts, although none of the limitations were there present which this Court applied in *United States* v. *Gilliland,* 312 U. S. 86 (1940), and which have been followed in all cases in the lower courts in which convictions have been sustained under the False Claims Act. The false statements involved in Counts X and XI were made in a private, informal, unregulated interview between petitioner and Panuch, his superior in office, initiated, at petitioner's request, to discuss the reasons why Panuch had requested petitioner voluntarily to resign from government

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employment. The interview was not a removal proceeding, in conformity with regulations which provide for a hearing of charges against employees. No law, rule or regulation required petitioner to be present or to make statements; his obligations were undefined; no suitable notice was given of the consequences of knowingly and wilfully making any false or fraudulent statements; and no procedural safeguards were provided. The holding of the court below is based on an inapplicable quotation from the opinion of this Court in the *Gilliland* case and on a misunderstanding of its decision. We submit that the False Claims Act is not applicable to the false statements in Counts X and XI.

B. By its terms, the False Claims Act applies to *any* false or fraudulent statement "in *any* matter within the jurisdiction of *any* department or agency of the United States." Its scope, thus, is co-extensive with the ever-widening scope of federal power, which is itself dependent upon the decisions of this Court. Absent some restrictive interpretation for its application, the statute would appear to be so broad and uncertain as to violate the requirement that every man is entitled to know with certainty when he is committing a crime and thus the constitutional guarantees of due process and specificity, under the Fifth and Sixth Amendments. This Court, however, has applied such a restrictive interpretation. In the *Gilliland* case, it upheld the False Claims Act, as against the objection that it was invalid because of indefiniteness, on the ground that the "Hot" Oil Act and pertinent regulations, in aid of whose enforcement the False Claims Act was invoked, imposed a duty to make statements to the government agency involved, adequately defined the duty, and provided suitable notice of consequences. The False Claims Act was held to be applicable as a fitting complement to other statutes

under which, in connection with the authorized action of government agencies, the presentation of statements is required. In the case at bar, the court below has departed from this restrictive interpretation. Without adverting to the fact that no law, rule or regulation enjoined an adequately described duty on petitioner requiring him to make statements, with suitable notice of consequences, it held that the False Claims Act was validly applied to effectuate a general requirement, with criminal sanctions, that a government employee, discussing officially with his superior an official matter within the jurisdiction of a government department, must be truthful. The government's supporting argument is that the discussion in which the alleged false statements were made was "serious", not "casual". These attempted distinctions do not bring the False Claims Act, as thus applied, within the constitutional guarantees. The words "official" and "serious" are no substitute for the criteria of obligation, definition and notice which are required to provide an ascertainable standard of guilt. Standing alone, unlimited by any such criteria, the False Claims Act covers so much that it effectively covers nothing. The record shows that it was so applied in the trial of Counts X and XI.

The judgment on those counts, therefore, cannot be sustained. Since the first nine counts of the indictment were properly held to have been barred by the statute of limitations, the case should be dismissed.

II. The court below erred in sustaining the judgment on Counts X and XI, because of the prejudicial error which resulted from petitioner's having been indicted, tried, convicted and sentenced for eleven violations, when only two violations of the False Claims Act could validly have been involved.

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A. Petitioner was substantially prejudiced by the submission to the jury and the inclusion as issues upon his trial of the nine barred counts. These counts were separate and distinct from the last two counts, involved different issues, and contained numerous charges of crimes and other prejudicial matter, not included in the last two counts. The submission of the first nine counts, on which no conviction had or could lawfully be obtained, was prejudicial error in the trial of the last two counts alone within the principle of those decisions which prohibit the admission in evidence of an indictment without proof of conviction. The inclusion of the first nine counts as issues in the trial of the last two counts was prejudicial error because it confused the issues involved in the last two counts and permitted the introduction of evidence, irrelevant to the issues in those counts, except for the prohibited purpose of proving petitioner's disposition to commit crime.

B. Petitioner was substantially prejudiced by the admission in the trial of the last two counts of evidence offered to prove or in connection with the proof of the allegations of falsity under the nine barred counts. Such evidence tended to establish that he had committed other different crimes of prohibited advocacy under other federal and state laws, and of false statements or perjury to federal and state agencies at other times and on a different subject from those involved in the last two counts, as well as deception and duplicity in the nature of crime which in its effect upon the jury was as prejudicial as the proof of other crimes. In the trial of the last two counts, this evidence was relevant only to prove petitioner's disposition to commit crimes, and, was, in any event, if admissible, not

submitted with the necessary precautionary instructions, without which its admission was prejudicial error.

C. Petitioner was substantially prejudiced by the admission in the trial of the last two counts of evidence offered to prove the false statements charged in the nine barred counts. The statements in these barred counts, as submitted, constituted the *sine qua non* of nine separate offenses, which were collateral to, and independent offenses in relation to the crimes charged under the last two counts. Their only relevance in the trial of the last two counts was to prove petitioner's disposition to lie and commit similar offenses. Even if the statements were admissible in the trial of the last two counts, they were not submitted with the required precautionary instructions, without which their admission was prejudicial error.

D. Petitioner was erroneously sentenced. The rule in *Claasen* v. *United States*, 142 U. S. 146 (1891) is not applicable here to sustain the general sentence imposed on separate verdicts on eleven counts, because this record amply rebuts the presumption of law that the court awarded sentence only on two good counts.

E. The trial court's error in denying the motion to dismiss the first nine counts of the indictment permeated the entire trial. It permitted the prosecuting attorney in his opening statement and the trial court in its instructions to put before the jury as additional and different issues upon the trial of the last two counts alone, accusations of crime which were barred and numerous allegations of prejudicial matter which should never have been included in the indictment. It led to the improper admission of evidence of nine

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separate crimes under the False Claims Act, of other irrelevant crimes under other federal and state laws and of other prejudicial matter in the nature of crimes, which prejudicially affected the verdict. It prevented petitioner from objecting to the admission of evidence and from requesting precautionary instructions. It permitted the jury to find petitioner guilty of nine crimes for which he was not validly on trial and led the trial court to misdirect the jury and to impose an erroneous sentence on counts which should not have been submitted.

In the total setting of this case, these errors fully warrant reversal of the judgment and a new trial.

III. The court below erred in sustaining the judgment on Counts X and XI because of the application of an unconstitutional standard by the trial court for the admission of evidence.

The record shows that the trial court excluded admissible evidence relating to Negroes and a Negro organization, solely because of the supposed inability of the predominantly Negro jury in the case to weigh such evidence on the same terms as any other representative jury. The evidence which was excluded was admissible as a matter of right on petitioner's part, under the ordinary rules of evidence, to rebut the testimony of prosecution witnesses and to test credibility by showing bias, interest and misconduct, in relation to matters, which, under applicable law, were not collateral and which petitioner would have been entitled to present on his own behalf. The court below has misconstrued the effect of the rulings and has failed to perceive the unconstitutional standard which the trial court applied. To

the extent that this evidence was admissible under the ordinary rules of evidence, its exclusion was error without regard to the motives of the trial court and cannot be justified, without violating constitutional guarantees, by the supposed susceptibility to prejudice of the predominantly Negro jury in the case. To the extent that the limitation of such evidence was subject to the trial court's discretion, the race and color of the jury was an improper and constitutionally prohibited basis for the exercise of that discretion.

We submit that the trial court's failure to treat the predominantly Negro jury in the case as a representative jury, as constitutionally required, necessitates a reversal of the judgment below and a new trial, and, as action contrary to the public policy of the United States, warrants correction by this Court in the exercise of its supervisory powers over the courts of the District of Columbia.

ARGUMENT

Point I

THE FALSE CLAIMS ACT IS NOT APPLICABLE TO THE TRIAL OF COUNTS X AND XI. IF APPLICABLE, IT IS INVALID BECAUSE OF INDEFINITENESS UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION.

Since the Court below held that the first nine counts of the indictment were barred by the statute of limitations and the government has not sought to review that holding by cross-petition for certiorari, the only question remaining in the case is the validity of the judgment on counts X and XI. We shall in this point discuss the application of the statute to the trial on these counts, leaving to later discussion the other questions affecting the trial.

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Counts X and XI charge that petitioner, while employed in the State Department, wilfully and knowingly made false statements to duly authorized officer of that Department in a matter within its jurisdiction, namely, in an inquiry into the character and fitness of petitioner in relation to his continued employment (R. 17, 18). Each count deals with a separate statement made on a single occasion: the Xth charges petitioner with having falsely denied membership in the Communist Party (R. 17), the XIth with having falsely denied the use of an alias (R. 19).

The statute under which the indictment was found (18 U. S. C. 80) punishes the making of false statements wilfully and knowingly "in any matter within the jurisdiction of any department or agency of the United States * * *".

As the facts show (pp. 11-12, *supra*), this statute was here applied to punish statements made by one government employee to another in a private, informal and unregulated discussion, which was initiated by petitioner for the purpose of ascertaining why his resignation had been requested for security reasons (R. 47-49), where no law, rule or regulation of the State Department or of the Civil Service Commission, or otherwise, required petitioner to appear or make statements, where his obligations were undefined, no procedural safeguards were provided, and no suitable notice was given of the consequences of knowingly and wilfully making any false or fraudulent statements.

Petitioner contends that the False Claims Act is not applicable to punish false statements made under these circumstances, and that, if applicable, it is invalid because of indefiniteness under the Fifth and Sixth Amendments.

Petitioner first raised these contentions by motion to dismiss the indictment. The trial court summarily disposed of the motion (R. 25) by a mere reference to *United States*

v. *Meyer* 140 F 2d 652 (C. C. A. 2, 1944). The decision in that case, however, did not discuss any of the issues which have been raised in the case at bar. It held merely that the statute covered false statements, even though oral, made at a formal hearing conducted pursuant to regulations of which defendant had adequate notice. The further ruling that defendant could not in a trial under the False Claims Act collaterally attack the constitutionality of the Executive Order which set up the Exclusion Board before which he appeared has, of course, no bearing in the case at bar, since no similar issue is here involved. The decision therefore is not authority for the contention that the False Claims Act applies to statements made in an informal interview not held pursuant to any statute or regulation.

Petitioner again raised the question of the inapplicability and the unconstitutional indefiniteness of the statute by appropriate motions at the end of the government's case, (R. 31) at the end of petitioner's case (R. 31, 33) and for a new trial (R. 46). The trial court denied these motions without further discussion.

The court below also rejected petitioner's contentions. It held that since the interview concerned a matter within the jurisdiction of a department of the United States, the statute was applicable, without limitation, to any false statement made in that interview (R. 293). It did not refer to petitioner's claim that the interview had no basis in any statute or regulations, which enjoined any duty on petitioner to make statements or described the subject matter, or gave him suitable notice of the consequences of making false statements. The only support cited by the court below for its holding is a passage from the opinion of this Court in *United States* v. *Gilliland*, 312 U. S. 86, at 93 (1941) (R.

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293) which is wholly inapplicable. As the context of the passage clearly shows, this Court merely held that in the light of the 1934 Amendment to the statute, the statute was no longer restricted to false statements involving pecuniary or property loss to the government. The language quoted by the court below bears only on that phase of the statute and is not authority for a decision that the statute in its present form is applicable, without any other limitations.

The court below disposed of petitioner's further contention that the statute, if applicable, was invalid because indefinite by asserting that there was "no ambiguity in the language" of the statute "which would place in doubt the requirement that a government employee, discussing officially with his superior an official request for his resignation, must be truthful" (R. 293). The opinion contains no discussion of the need for any limitation of the statute, such as that discussed by this court in the *Gilliland* case at p. 91 of its opinion, and apparently rests its denial of the constitutional objection entirely on the ground that the interview was "official".

We submit that the court below has misconstrued the statute, contrary to the decision of this court in the *Gilliland* case and has thereby permitted its application in violation of petitioner's rights under the Fifth and Sixth Amendments.

A. The statute is inapplicable to the false statements in the trial of Counts X and XI.

The *Gilliland* case involved affidavits and reports which were required to be made, on approved forms, to a Federal Tender Board established by the Secretary of the Interior, under regulations authorized by and for the enforcement of the "Hot Oil" Act. This Court held that the False Claims Act was applicable to punish such statements, if

false, not only because the statements manifestly related to a matter within the jurisdiction of a department of the United States but also, because:

"The statute (cannot) be deemed to be invalid because of indefiniteness. The affidavits and reports *required* had been sufficiently described and the *duty enjoined* had been *adequately defined*. Any one presenting the *required* affidavits and reports to the Board set up under the *pertinent regulations* was *suitable charged with notice of the consequences* of knowingly and wilfully including therein any false and fraudulent statements. . . . The Act of 1934 (The False Claims Act), with its provisions as to false and fraudulent papers, has its place as a *fitting complement* to the Act of 1935 (the "Hot Oil" Act) as well as other statutes, under which, in connection with the authorized action of governmental departments or agencies, the presentation of affidavits, documents, etc. is *required*" (ibid. pp. 91, 95-96, italics supplied).

The opinion thus indicates that the False Claims Act is constitutionally applicable under the following limitations: (1) it must be a complement to some other statute or authorized regulation, in aid of their enforcement; (2) that other statute or regulation must require the making of statements in a matter within the jurisdiction of a department or agency of the United States; (3) the duty enjoined by such statute or regulations to make such statements must be adequately defined; and (4) there must be suitable notice of the consequences if the required statements are false or fraudulent and knowingly and wilfully made.

We submit that the False Claims Act was not applied in conformity with these limitations in the trial of Counts X and XI in the case at bar.

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It cannot be disputed that there is here involved no other statute or regulation imposing any requirement on petitioner to make any statement, to which the False Claims Act might be a fitting complement.[8] It should be borne in mind that the interview with Panuch was not a proceeding to remove petitioner as an employee, e.g. under the provisions of Civil Service Rule XII,[9] but a purely informal conference, growing out of a request that petitioner voluntarily resign. Moreover, it was held at petitioner's own request, and not at Panuch's direction.

The interview was not in conformity with the provisions of Rule XII, or Departmental Circular 222 of the Commission (Government Exhibit 24, App. 48, 49) which require written notice of the charges against the employee, with reasons given, a reasonable time for personally answering the same in writing, with affidavits, and a trial or hearing in the discretion of the removing officer, the record in the case to be made a part of the records of the department. Review by the Commission is provided for failure to follow this procedure. It was not in conformity with the requirements of the President's Loyalty Order of March 21, 1947,[10] or the

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[8]It is not enough, therefore, that the State Department Appropriation Act, to which the government refers (Brief in Opposition to Petition p. 20 R. 23-24), prohibits the payment of salary to persons who advocate or belong to organizations which advocate the overthrow of the government by force or violence. Pretermitting for the moment the question of whether the Communist Party is such an organization, the holding of the *Gilliland* case requires not merely that the inquiry relate to a matter within the jurisdiction of the United States, but that the law or regulation, to which the False Claims Act is a complement, must require a statement to be made about that matter.

[9]5 U. S. C. 1940 ed. 652; Civil Service Act, Rules and Regulations Annotated (1943 ed.) p. 283.

[10]Executive Order 9835. 12 Fed. Reg. 1935 (1947).

regulations of the Loyalty Review Board, pursuant to the Order,[11] which require that the employee charged with disloyalty shall be served a notice in writing at least thirty days in advance of the proposed removal, with the following information: a statement of the charges, the right to answer in writing within a reasonable time, the right to a hearing before a board, at which he is entitled to appear personally with counsel of his own choosing and to present evidence in his own behalf. The hearing in such cases is required to be "conducted in an orderly manner and in a serious business-like atmosphere of dignity and decorum. . . . The testimony shall be taken under oath or affirmation (and) shall be recorded and transcribed and made a permanent part of the record in the case (or) by suitable notes . . . which shall be summarized and agreed to by all parties".[12] It was not in conformity with Hearing Procedures of the Personnel Security Board of the State Department, effective October 7, 1947,[13] which require the employee to be served with a written prior notice of hearing and the charges, where possible, and accord him the privilege of answering the charges, of appearing with counsel in his own behalf, of presenting sworn testimony, if he so requests, and of refusing to answer any questions, with a stenotypist record to be made of the testimony.

Since the interview with Panuch in this case did not relate to any removal procedures but was a discussion about a suggested voluntary resignation, it was not called for by any statute or regulations and was conducted entirely without the procedures or safeguards established by any regulations. The government, moreover, in effect concedes that

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[11]13 Fed. Reg. 253 (1948).

[12]Ibid. 256.

[13]Department of State Press Release No. 798, October 7, 1947. See also Department of State Press Release No. 874 (November 1, 1947), 886 (November 5, 1947) and 960 (December 10, 1947).

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in this case the interview was not in conformity with any regulations (Brief in Opposition to Petition, p. 22, ftn. 11). Moreover, in the framing of the indictment the government recognized that there was a difference between this situation and the other occasions on which it claimed petitioner made false statements. In each of the first nine counts of the indictment it is alleged that the investigation in the course of which the false statement was made was being conducted "under the authority of statutes, rules and regulations of the United States, and executive orders of the President of the United States" (R. 3, 4, 6, 8, 10, 11, 12, 14 and 15. See App. 47-48). No similar statement is contained in the last counts (R. 17, 18).

The need for a statutory obligation to make a statement has been recognized under the authorities. *United States* v. *Gilliland, supra.* In *United States* v. *Long,* 14 F. Supp. 29, the Court held that a statement made voluntarily and not pursuant to some requirement of the law was not included within the statute (See Judge A. N. Hand's interpretation of this decision in *United States* v. *Presser,* 99 F. 2d 819, at p. 822). In *Hamner* v. *United States,* 134 F. 2d 592, a conviction under one count was reversed because the false statement which formed the basis of that count did not relate to anything which the pertinent regulations required to be stated. This is in accord with the familiar principle that a false sworn statement is not punishable under the perjury statutes, if not required to be made by pertinent law or regulations (See *United States* v. *Nickerson,* 58 U. S. 204 (1858), 1 Sprague 232 Fed. Cos. No. 15878. *Williamson* v. *United States,* 207 U. S. 425 (1907); 108 A. L. R. 1242.

No case has been found in which a conviction has been upheld, under the False Claims Act, where the statement claimed to have been false was not required to be made by

some law or regulation or where some procedure was not established which imposed at least a conditional duty to make a statement because of the possible adverse consequences which might result from not making a statement. The *Meyers* case, which we have already discussed, comes within the last described category. While the regulations did not compel Meyers to appear before the exclusion board, it was evident that if he did not appear he would be excluded; thus there was at least a conditional duty imposed upon him. Here, the only action that could then[13a] be taken against petitioner if he refused to resign would be to prefer charges against him in conformity with Civil Service Rule XII. This would have changed the situation from one where the statements were voluntary to one where they were required, at last conditionally.

Obviously if there is a duty imposed, the scope of that duty must be defined. It is because of the existence of such duty and definition that convictions were upheld in the two cases relied upon by the government in its brief in opposition to the petition for certiorari (p. 21 and ftn. 10).

Thus, in *United States* v. *Zavala*, 139 F. 2d 830 (C. C. A. 2, 1944), the false statement was contained in a customs declaration, the making of which was required by regulations which were specifically called to the attention of the accused. The only question in the case was whether or not it made any difference that an amendment made at the dock was written out by the inspector rather than by the accused. The Court ruled that the act of the inspector, having been approved by the accused, was the act of the accused.

[13a]The so-called "McCarran Rider", permitting removal of any employee of the State Department, notwithstanding the provision of any other law, was not enacted until July 5, 1946 (Department of State, Justice, Commerce and the Judiciary Appropriation Act, 1947, ch. 541, Pub. 490 [HR 6056] Title I, U. S. Code Congressional Service, 79th Cong. 2nd Sess. 1946, pp. 441-442).

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In *Spivey* v. *United States*, 109 F. 2d 181 (C. C. A. 5, 1940), cert. den. 310 U. S. 631, the false statements were made in Commodity Credit Corporation producers' cotton notes given as security for loans under applicable regulations. Besides, there was much more involved in that case than mere false statements and the applicability of the statute, as construed in the *Gilliland* case, was never seriously in question.

To like effect see:

United States v. *Heine*,
149 F. 2d 485 (C. C. A. 2, 1945) and

United States v. *Barra*,
149 F. 2d 489 (C. C. A. 2, 1945) (false statements in application for a certificate of identification required by Presidential Proclamation and procured in accordance with detailed regulations of Attorney General.)

United States v. *De Lorenzo*,
151 F. 2d 122 (C. C. A. 2, 1945) (false statement in an application for federal employment subject to certification by Civil Service Commission, of which defendant was aware.)

There was here nothing in the circumstances of the interview with Panuch which defined the scope of any duty on petitioner's part. The issues were not defined by any prior notice of charges in writing, with opportunity to petitioner to answer in writing, with affidavits, or otherwise, as they would have been if the interview were in conformity with Civil Service Rule XII, Departmental Circular 222, the Loyalty Regulations or the Hearing Procedures of the Personnel Security Board of the State Department.

In the absence of such devices for definition, and in the further absence of the record of the prior hearings before the F. B. I. and the Commission, of which Panuch was completely ignorant, the discussion covered a wide variety of topics, apparently lasted as long as the Panuch and petitioner had anything to discuss, and was not confined to any specific issue.

Finally, in the absence of pertinent laws or regulations, there was nothing in the circumstances of the interview which suitably charged petitioner with notice of the consequences of knowingly and wilfully making any false or fraudulent statements. The interview was private; his statements were not under oath; no stenographer was present to record what he said; Panuch gave no indication that the interview was of enough importance to require any written memorandum of it, and, in fact, Panuch never made or filed such a memorandum. The interview was not conducted in a "serious businesslike atmosphere of dignity and decorum." Petitioner and Panuch addressed each other as "Joe" and "Carl" throughout the interview and were obviously on an informal basis, which was consistent with their friendly relationship. In respect to notice of consequences, there was no indication that the present interview differed from many others, in which petitioner saw Panuch in the ordinary course of business.

This requirement of notice of consequences is implicit in Civil Service Rule XII, with its provisions for notice of charges with reasons given and opportunity to answer, with affidavits, and in the similar provisions of Departmental Circular 222; it is more fully implicit in the Hearing Procedures of the State Department and the President's Loyalty Order, with their additional provisions, requiring testimony under oath, permitting the right of counsel, and

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the right to refuse to answer questions, with a transcript made of the statements.

No case has been found upholding a conviction under the False Claims Act, where such notice was not provided by the statute, rule or regulation which required the statement to be presented or by the circumstances involved. See *United States* v. *Meyer, United States* v. *Heine, United States* v. *Barra, United States* v. *Zavola, United States* v. *DeLorenzo, supra.*

In the absence of such notice, the statute becomes a trap for the unwary[14] and fails to meet one of the essential criteria for its applicability, under the *Gilliland* case.

In short, none of the elements was here present which have been required in all the cases in which convictions have been sustained. We submit that the False Claims Act is inapplicable to the trial of Counts X and XI.

B. If applicable, the Statute is Invalid because of Indefiniteness.

The legislative history and terms of the False Claims Act, as construed by this Court in the *Gilliland* case, clearly indicate that the purpose of the statute was to aid in the enforcement of other laws which require the presentation of statements to departments or agencies of the United States in particular matters within their jurisdiction. The court below, however, has held that the False Claims Act can be applied, not to aid in the enforcement of other laws of this description, but to effectuate a general requirement, with criminal sanctions, that government employees, discussing any official matter within the jurisdiction of a department or agency of the United States with their superiors, must be truthful (R. 293). If the False Claims

[14]See *United States* v. *Bell,* 81 F. 830, 839, 853 (C. C. W. D. Tenn. 1897).

Act, standing alone, applies in this broad way, the issue is raised as to whether it can be validly applied, consistently with the requirements of due process and specificity under the Fifth and Sixth Amendments.

We submit that unless the applicability of the statute is limited, in the manner indicated by this Court in the *Gilliland* case, it falls under that line of decisions of this Court which have struck down vague and general laws, as providing no ascertainable standard of guilt.

Sometimes it has not been found possible to find any limitation upon the words used sufficient to sustain the law. This was so in various cases dealing with "reasonable prices", as in *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, and *Connally* v. *General Construction Co.*, 269 U. S. 385. In other cases it has been found possible to uphold the validity of the statute by restrictive interpretation as in *Fox* v. *Washington*, 236 U. S. 273, and *Screws* v. *United States*, 325 U. S. 91.

This Court has indicated in the *Gilliland* case that the statute here involved falls within the second group rather than the first. Clearly the statute cannot apply, without any limitations, to all false statements concerning matters within the jurisdiction of governmental departments and agencies. To punish all such statements under all circumstances would not only run afoul of the First Amendment (see *Winters* v. *New York*, 333 U. S. 507) but would involve the same difficulty with which this Court was confronted in the *Screws* case because of the ever widening scope of federal power dependent upon decisions of this Court. It has therefore been generally recognized that the statute does not apply where the deception is not practiced upon the particular agency charged with the administration of the law, and thus having juridiction in the sense

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of power to deal with the matter. In *United States* v. *White*, 69 F. Supp. 562, the Court held that there could be no prosecution for a statement made to a state police officer which concealed the fact that defendant was transporting aliens illegally in the country. In *United States* v. *Crittenden*, 24 F. Supp. 84, the court held that a false statement made in connection with a state accounting by a veteran's guardian could not be punished. See also *Terry* v. *United States*, 131 F. 2d 40 (C. C. A. 8, 1942); cf. *United States* v. *Sanders*, 42 F. Supp. 436 (D. C. S. D. Texas 1941).[14*]

Nothing which the government urged in its opposition to the application for the writ of certiorari meets the issue which petitioner has raised. The first contention there made (pp. 19, 21) results from a misunderstanding of petitioner's contention. This is not merely that the indictment is insufficient or that the statement was unsworn and not transcribed. It is that the statute itself cannot be constitutionally applied to punish false statements uttered by petitioner under all the circumstances shown in the trial of Counts X and XI because, as those circumstances show, petitioner was held merely to a general requirement to be truthful on official matters or matters within the jurisdiction of the United States, with no requirement in laws, rules or regulations which would have enjoined and adequately defined his obligation to make statements and provided suitable notice of consequences. The *Zavola* and *Spivey* cases, *supra*,

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[14*]From this point of view, petitioner's statements were not in a matter within the jurisdiction of the Department, since the only power to require such statements was conditioned on the observance of regulations which had not been followed. In this respect, Panuch was in no different position from the State Police Officer in the *White* case, *supra*, and petitioner's position was as much that of a volunteer as the position of the accused in the *Hamner* case, *supra*.

cited by the government, are wholly different from the case at bar because in each of them there was an applicable law or regulation which met the criteria of the *Gilliland* case.

The government further suggests that in applying the statute to the facts of this case, it has not sought to prosecute for "casual" statements, claiming that Panuch regarded the matter "seriously" and testified that "the conference was in the nature of an appeal, the man was appearing before me as Deputy Assistant Secretary and he was entitled to have his day in court" (Brief in Opposition to Petition, pp. 21, 23).

Panuch's characterization of the interview was not communicated to petitioner at the time but was reserved for testimony at the trial (R. 52). This after-the-event characterization cannot formalize what was never formal. An appeal would have been held pursuant to some law or regulation. It might have been appropriate in connection with removal charges. It could have no application to the situation which then confronted the parties, namely, a request for a resignation. Panuch, who is an attorney (R. 58) must have known that this was not an appeal. Moreover, it is apparent that he did not regard the matter seriously enough to find out about or have before him a record of the prior proceedings, or to advise petitioner of the charges in advance, although a month elapsed between the request for the resignation and the interview, the date and place of which was fixed by Panuch (R. 48); to have other State Department officials or even a stenographer present; to advise petitioner of his rights; or otherwise to afford petitioner what a lawyer would normally regard as the requirements of "a day in court", if he was serious about the matter.[15] That

[15]See, *United States* v. *Lovett*, 328 U. S. 303, 317-318 (1946) *In Re Oliver*, 92 L. ed. 492, 500 (1948).

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petitioner was "capable" of knowing that Panuch's inquiries related to a matter within the jurisdiction of the Department (Brief in Opposition to Petition, p. 24) is no substitute for the fact that petitioner was not, as was his right placed under an adequately described duty, with suitable notice that his statements, if false, were punishable under the statute. If Panuch, had wished to lay a foundation for the possible invocation of criminal sanctions for false statements, he could have done so by resort to the appropriate law or regulations which required the making of statements on this matter. His failure to act in accordance with law should not result in the unconstitutional application of the False Claims Act.

We submit that there is no basis in the statute for the attempted distinction made by the government between "casual" and "serious" conversations. There is likewise no basis for the construction adopted by the court below holding that the statements were properly punishable because the interview was "official".[16] Such unwarranted constructions make a palimpsest of the statute. Neither "official" nor "serious" meets the test of constitutional definiteness. Neither is a substitute for the criteria of obligation, definition and notice which are required to provide an ascertainable standard of guilt. On the other hand, if prosecution is limited to situations where a duty, direct or conditional, is imposed by some other law which meets the criteria applied in the *Gilliland* case, and in aid of which

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[16]Cf. "Official: 2. Of or pertaining to an office, position or trust 3. Holding an office or serving in a public position; authorized to perform a service 4. Prescribed or recognized as authorized; 5. Befitting to, or characteristic of, a person in office or a person when acting in this official capacity; formal." "Websters New International Dictionary Second Edition Unabridged.

the False Claims Act is invoked, the constitutional requirements are satisfied.

The key words of the statute are "in any matter within the jurisdiction of any agency or department of the United States". Standing alone, unlimited by any law, rule or regulation, or applied under circumstances which do not enjoin the duty or adequately define it, with suitable notice of consequences, they attempt to cover so much that they effectively cover nothing. The record shows that the statute was so applied in the trial of Counts X and XI herein, thereby depriving petitioner of his rights under the Fifth and Sixth Amendments to the Constitution. We submit the judgment below should be reversed and the case dismissed.

If this Court does not agree with the foregoing, our contention, in the alternative, is that the judgment below should be reversed and the case be remanded for a new trial on counts X and XI for the reasons set forth in Points II and III below.

Point II

PETITIONER WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL, IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION AND HIS RIGHTS WERE SUBSTANTIALLY PREJUDICED BY HAVING BEEN INDICTED, TRIED, CONVICTED AND SENTENCED FOR ELEVEN VIOLATIONS WHEN ONLY TWO VIOLATIONS OF THE FALSE CLAIMS ACT COULD VALIDLY HAVE BEEN INVOLVED.

Petitioner before trial moved to dismiss the first nine counts of the indictment as barred by the statute of limitations (R. 20). The trial court denied this motion (R. 20,

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26-30). Petitioner renewed the motion, at the close of the government's case (R. 31), in a motion for judgment of acquittal (R. 31) and in a motion for new trial (R.46). The trial court also denied these motions (R. 31, 33, 47). The case was tried and submitted on all eleven counts (R. 36-43); the jury returned a verdict of guilty on each count (R. 45-46); and the trial court sentenced petitioner generally to one to three years imprisonment on all eleven counts (R. 47).

The court below properly held that "the first nine counts of this indictment were barred by the statute of limitations and defendant's motion that they be dismissed should have been granted" (R. 276). "(The) trial . . . could validly involve only the last two counts . . . It was error to permit the first nine counts to remain in the indictment and to go to the jury" (R. 277).

The court below held, however, that petitioner was not prejudiced by this error because the statements alleged to have been false in the barred counts were the same as or similar to the statements involved in the two counts properly on trial, no evidence was improperly admitted by reason of the erroneous inclusion of the barred counts upon the trial, and, therefore, the issue actually submitted to the jury was actually and in fact the same as it would have been if only the last two counts had been submitted (R. 278).

In so holding, we submit, the court below is wrong in fact and in law and has ignored the following prejudicial errors, each of which separately considered, was substantially prejudicial, and all of which, taken in their cumulative and total effect, constituted such massive prejudicial error, so clear a denial of due process and a fair trial, as fully to warrant reversal and a new trial.

A. Prejudicial Error in the Inclusion as Issues on the Trial and the Submission to the Jury of the First Nine Counts of the Indictment.

The error of the trial court in denying petitioner's motions to dismiss the first nine counts of the indictment permitted the prosecuting attorney in his opening statement (App. 3-5) to summarize at length and the trial court in its instructions to the jury to quote in full all the allegations of the first nine counts, (R. 36-40) and to direct the jury to bring in a verdict on all counts, including these nine (R. 36). A copy of the indictment was submitted to the jury for its deliberation. (R. 45)

The submission to the jury of these nine barred counts constituted prejudicial error. These counts did not charge a continuing offense or one arising out of the same transaction with the offenses charged in the last two counts. On the contrary, each count of the indictment charged each false statement as a complete and separate offense; each count required proof of a false statement which the other counts did not; and each false statement, if timely, was separately punishable under the statute. (R. 22. *Ebeling* v. *Morgan,* 237 U. S. 625, 628-631 (1915); *Blockburger* v. *United States,* 284 U. S. 229, 301-304 (1932); see *Gavieres* v. *United States,* 220 U. S. 338 (1911)). The first nine counts, however, were erroneously submitted to the jury, as timely. As thus submitted, these counts constituted nine separate formal accusations of crime, which gave shape, force and authority to the evidence directed to those counts at the trial, particularly with respect to the allegations as to falsity, and carried with them the sting and opprobrium of criminality. See 3 Wigmore on Evidence (3rd ed. 1940) Section 980 (a) and cases and authorities there cited. If

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the trial had been limited to the last two counts, it would have been prejudicial error, under well established decisions, to permit any evidence, on the government's case in chief, or by cross examination of petitioner, as to the indictment on the nine prior counts.[17] Here, the submission of these counts to the jury was even more prejudicial than if those nine counts had been introduced in evidence, because, while evidence is subject to rebuttal or explanation, the fact of the indictment on the nine barred counts as submitted, was irrebuttable. Petitioner was thus prohibited from showing that no conviction had been or could then lawfully be obtained on those counts of the indictment, (R. 36) and that he was entitled to a judgment on the ground of the statute of limitations which was no less a protection to him than a judgment on the ground of innocence. (*United States* v. *Oppenheimer,* 242 U. S. 85, 87 (1916).)

The inclusion of the nine counts as issues on the trial was equally prejudicial error, within the principle of those decisions which hold that improper joinder of counts in an indictment constitutes grounds for reversal.[18]

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[17]*Thomas* v. *United States,* 121 F. 2d 905, 907 (App. D. C. 1941); *Sanford* v. *United States,* 98 F. 2d 325, 327 (App. D. C. 1938) (citing cases); *Coulston* v. *United States,* 51 F. 2d 178, 182 (C. C. A. 10th 1931); *Thompson* v. *United States,* 30 App. D. C. 352, 359, 360 (1908); *Coyne* v. *United States,* 246 Fed. 120 (C. C. A. 5th 1917); 3 Wigmore on Evidence (3rd ed. 1940) Section 980 (a).

[18]*Bass* v. *United States,* 20 App. D. C. 232 (1902); *McElroy* v. *United States,* 164 U. S. 76 (1896); *De Luca* v. *United States,* 299 F. 741, 743 (C. C. A. 2, 1924); *Beaux Art Dresses* v. *United States,* 9 F. 2d 531, 533 (C. C. A. 2, 1925) cert. denied 270 U. S. 644 (sub nom. *Todd* v. *United States*); *Zedd* v. *United States,* 11 F. 2d 96 (C. C. A. 4, 1926); *Castellini* v. *United States,* 64 F. 2d 636 (C. C. A. 6, 1933); See *Williams* v. *United States,* 168 U. S. 382, 391 (1897); *Pointer* v. *United States,* 151 U. S. 396, 400 (1894).

"In cases of felony the multiplication of distinct charges has been considered so objectionable, as tending to confound the accused in his defense, or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury or otherwise, that it is the settled rule in England and in many of our states to confine the indictment to one distinct offense or restrict the evidence to one transaction. . . . Necessarily where the accused is deprived of a substantial right by the action of the trial court, such action having been properly objected to, is revisable on error. . . . And even if the defendants are the same in all the indictments consolidated, we do not think the statute authorizes the joinder of distinct felonies, not provable by the same evidence and in no sense resulting from the same series of acts." *McElroy* v. *United States,* 164 U. S. 76, 80 (1896).

Here, petitioner was indicted, tried, and convicted for nine separate offenses for which he was not validly on trial and which arose in different transactions from those involved in the last two counts. Concededly, it was error to join the first nine counts with the last two. By such joinder, petitioner was prejudiced in being held out to be habitually criminal, and was deprived of substantial rights. As pointed out more fully below, the issues involved in the trial of the first nine counts were separate and distinct from those involved in the last two counts; and important evidence, relevant only to prove that petitioner had knowingly and wilfully made false statements, as charged in the nine barred counts, was admitted at the trial, although irrelevant to any of the issues in the last two counts, except for the prohibited purpose of proving petitioner's disposition to commit other similar and different crimes

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(See Point II B and C, *infra*). The resulting confusion of issues, we submit, constituted prejudicial error in the trial of the last two counts.

The first ground, relied upon by the court below, to support its contrary conclusion is that the statements alleged to have been false in the barred counts are the same as or similar to those in the two timely counts.

In fact and in law, however, the statements alleged to have been false in the two sets of counts are not the same.

Each count of the indictment consists of three pertinent parts: the statement alleged to have been false; the allegation or allegations as to the falsity of such statement; and the allegation as to knowledge and wilfulness. The court below has isolated the statements alleged to have been false from the remaining allegations in each count and has then erroneously posited an identity between such statements by considering only their subject matter in abstraction from the differing circumstances alleged as to each statement.

Counts X and XI allege that petitioner in 1946 knowingly and wilfully made false and fraudulent statements to a representative of the State Department that he had never been a member of the Communist Party and had never used the alias Tony Whales. The allegations as to falsity are that petitioner was such a member and did use the alias in the Party in 1940 and 1941 (R. 16-19).

The subject matter of seven of the statements alleged to have been false in the first nine counts is the same as (Counts I, V, VI, and VIII) or similar to (Counts II, III and V) the subject matter of the statements alleged to have been false in Counts X and XI (R. 2-19). In all other respects, however, the statements in the two sets

of counts are indisputably different. They are different with respect to time, as the court below has recognized, by holding the first nine counts barred by the statute of limitations. They are different with respect to the governmental agencies involved and the circumstances under which they were made, as the indictment itself shows (see Point I *supra*). They are different, in Counts VII and IX, relating to petitioner's denial of opposition to conscription, with respect to subject matter. Most important of all, in this connection, five of the statements alleged to have been false in the first nine counts are different from those alleged to have been false in Counts X and XI with respect to the allegations as to their falsity (see Counts II, III, IV, VII, and IX).

These latter five counts contain thirty-nine or more allegations as to falsity which are entirely lacking in Counts X and XI. Thus, Counts VII and IX (R. 12, 15) charge that petitioner falsely denied in 1942 and again in 1943 to representatives of the Civil Service Commission that he had ever made any speeches against conscription. Each of these counts contains the same two allegations as to falsity. The first such allegation merely alleges, without any reference to membership or the use of an alias in the Communist Party, that petitioner did in fact speak at various public meetings advocating peace mobilization and urging listeners to bring pressure upon Congressmen and Senators to defeat legislation for military conscription. The second alleges that petitioner advocated similar matters at Communist Party meetings to Communist Party members. The statements alleged to have been false and the first allegation as to falsity in each of these counts raise only the issue as to whether petitioner had falsely denied that

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he had opposed conscription and are in no way comprehended within any of the allegations of the last two counts. With respect to the issue thus framed, petitioner could have been convicted under Counts VII and IX, wholly apart from any issue as to membership or alias, raised by the last two counts.

Again, Counts III and IV (R, 5, 7) charge petitioner with having falsely stated in 1942 to a representative of the F. B. I. that he had never contributed any services to or participated in the activities of the Communist Party. These statements are alleged in each count to have been false in the same eleven separate respects. Among such allegations of falsity are charges that petitioner counselled and advised Communist Party members and recruits "with respect to methods to be employed in infiltrating divers groups and societies for the purpose of creating Communist Front Organizations" (Counts III (e) and IV (e); "to sow resentment and discontent among Negroes by agitating the question of racial discrimination, to the end that members for said Party might be thus recruited" (Counts III (h) and IV (h); "concerning a plan, policy and program of said Party having for its purpose (1) disintegration of the morale of the Military Forces of the United States; (2) teaching the principles of Communism to men in said Military Forces; and (3) recruiting members for the Communist Party for the ranks of said Military Forces to the end that the Communist Party might gain control thereof and thus bring about a revolt against the Capitalist System." (Counts III (k) and IV (k). (R. 6-9, 36-38, App. 10-11).

These are charges of crimes under other federal and state laws and of misconduct, which in its effect upon

the jury is as prejudicial as the charge of other crimes. (See p. 54, *infra.*)

If the trial had been limited to the last two counts of the indictment, none of the statements charged as false in the first nine counts and none of the additional allegations therein as to their falsity would have been included in the indictment or submitted to the jury as criminal charges on which petitioner had been indicted. These charges, as well as all the others in the first nine counts are so highly prejudicial and defamatory that they constitute civil libel *per se*, as placing the accused "beyond the pale of respectability and making him a symbol of public hatred". See *Spanel* v. *Pegler*, 160 F. 2d 619, 622 (C. C. A. 7th, 1947, citing cases); *Mencher* v. *Chesley*, 61 N. Y. S. 2d 147 (1947); the refusal of a witness before a Grand Jury to answer such charges in the form of questions will be sustained on the basis of the privilege against self incrimination. See, *In re Costello* (D. C. D. C. June 27, 1947, unreported). Here, the trial courts instructed the jury to bring in a verdict on all the counts of the indictment, quoting verbatim all the prejudicial and inflammatory matters contained in the first nine counts (R. 36-39, 43).

If it is prejudicial and reversible error for the trial court to submit to the jury charges involving the "small dishonesties of trade" without calling the attention of the jury to the fact of such abandonment (*Nash* v. *United States*, 229 U. S. 373, 379-380 (1912)), it is infinitely more prejudicial for the trial court, as it did here, to submit to the jury highly inflammatory and prejudicial matters which were not only abandoned in part[19] but were totally barred, under instructions to consider it all.

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[19]In the *Nash* case, *supra*, two counts alleging conspiracies to restrain and monopolize trade, each containing the same twelve

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Such charges are not only inadmissible as hearsay, unproved, extraneous and prejudicial matter, which improperly rebuts the presumption of innocence accorded the accused and are thus assumed to be prejudicial without more,[20] but their inclusion as issues in this case may reasonably be taken to have had a substantially prejudicial effect on the trial of the issues in the only two counts which were held valid. If those two counts had been tried alone, the issue would have been whether petitioner's statements denying that he was a member of the Communist Party and had used the alias were true or false, and, if false, knowingly and wilfully made, without reference to the other nine counts of the indictment or the issues included therein. In

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allegations as to means, were submitted to the jury under instructions which permitted the jury to consider all the means and permitted a verdict on any of them. This Court reversed for the failure to instruct the jury that some of the means had been abandoned.

Here, Counts III and IV alleging false statements with respect to contribution of services to and participation in the activities of the Communist Party, each containing the same eleven allegations as to falsity, were submitted to the jury under instructions which invited the jury to consider all the allegations of falsity, which were quoted in full, and permitted a verdict on any of them (R. 36-38, 43). The government contended in the court below and has not denied in this court that two of these allegations as to falsity ((e) and (h) of Counts III and IV) were abandoned (See Petition p. 25, Reply Brief for Petitioner on Petition p. 9, Brief for Appellee in the court below, p. 37). The jury was not instructed as to the fact of such abandonment.

The *Nash* case is significant here, first, because the court below has assimilated the first nine counts to the last two, and thus, even if correct, has sustained the verdict on the last two counts, although two of the included counts were abandoned in part, without instructions as to the fact of such abandonment; and, second, because the submission of counts which have been abandoned is no less prejudicial than the submission of counts which are barred.

[20]See cases cited in footnote 17 *supra*.

the actual trial of eleven counts, this relatively simple issue was confused and prejudiced by the addition of further and unrelated issues under the barred counts as to whether petitioner had committed nine other crimes by making nine other false statements on three previous occasions, to representatives of two other governmental agencies under different circumstances, in two instances on a different subject matter, and with respect to different, additional and highly prejudicial allegations as to falsity, some of which involved additional crimes under other statutes.

The court below, however, has failed to consider or attach any weight to the distinction between the actual trial, where all the nine counts were permitted to remain in the indictment and to go to the jury, as actual issues on the trial, with all their sting of criminality still undrawn, under the erroneous ruling of the trial court with respect to those counts,[21] and a trial in which only two counts are involved, under a correct adjudication as to the nine counts, where the indictment on the nine prior counts and the additional issues included would not be before the jury, or the jury would be instructed to disregard such accusations, as having already been adjudicated on the merits. *United States* v. *Oppenheimer, supra.* The prejudicial effect of the trial court's erroneous ruling is further considered below in connection with the admission of evidence under the nine barred

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[21]Where the issue involves the constitutional privilege against self-incrimination, it is settled law that before the statute of limitations under which a witness can be prosecuted for a crime has run, he may plead the privilege; after it has passed, he cannot plead the privilege because there is no longer any danger to him. *Hale* v. *Henkel,* 201 U. S. 43, 57 (1906); *Brown* v. *Walker,* 161 U. S. 591, 598 (1896); in re *Doyle,* 42 F. 2d 686, 690 (D. C. S. D. N. Y. 1930; rev'd per curiam without opinion 47 F 2d 1086 C. C. A. 2nd 1931).

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counts. It is sufficient here to point out that the court below, having asserted an identity or similarity in the statements alleged to have been false in the two sets of counts, which in fact and in law does not exist, has erroneously concluded that the issues in the actual trial of eleven counts were the same as they would be in a hypothetical trial of the last two counts. On these mistaken premises, the court below has permitted the first nine counts, on which no conviction had been or could then lawfully be obtained, to be put before the jury, and included as issues in the trial of the last two counts, to the prejudice of petitioner, without justification in policy or citation in precedent and contrary to applicable decisions. This, we submit, constitutes prejudicial error.

B. Prejudicial Error in the Admission of Evidence of Other Different Crimes.

The court below held that no prejudicial error was committed in the admission of evidence by reason of the inclusion of the barred counts upon the trial, because all the evidence actually introduced would have been admissible in a trial limited to the last two counts. (R. 277) This holding, we submit, is erroneous.

1. The principal government witness, Drew, a police spy and *agent provacateur*, (See Point III B *infra*), testified that in October 1940, at one of a series of Communist Party meetings which he attended with petitioner, petitioner, identified as "defendant Tony", made a speech advocating that "now the young men in the Communist Party must get into the Army, so that we can disintegrate the morale of the men in order that the Communists may take over; that we could do a big job in helping the men with their grievances, forcing their fights and teaching them

Communism. In this way we could soon overthrow the capitalists and also take over control of the Army. We were to work on the officers as well as the men, and this job was especially assigned to young men of conscription age." (R. 104) Drew also testified that, on another occasion, in April, 1941, petitioner had spoken to a meeting sponsored by the National Negro Congress, stating that "we outnumbered the number of Communists in Russia during 1917 when the revolution took place. He said that now was the time for revolution, that the Communists could have a revolution in this country." (R. 116)

This evidence was admitted to prove the allegations as to falsity under barred Counts III (k) and IV (k). (R. 7, 9). The court below held generally that petitioner's speeches were consistent with the policies of the Communist Party and would, therefore, have been admissible upon the disputed issue of membership in the Party, under Count X, in a trial limited to the last two counts. (R. 277).

There is no evidence whatsoever in this record as to any advocacy by the Communist Party of any of the above acts.[22]

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[22]The nearest approach to such evidence is the testimony of Hewitt, to which exception was duly taken, who stated that in 1930 he went to Russia as a member of the Communist Party and remained there for about two years, during which time he attended the International Lenin School, to become indoctrinated with the definite purpose of learning espionage; to become professional revolutionists; to learn theory that would ultimately lead to the overthrow of the United States government (R. 255). Hewitt admitted on cross examination to having committeed perjury in his application for passport in 1930 and application for renewal of passport in 1932 in connection with this trip (R. 117-120, 129-139). There is no evidence in this record that the Communist Party then or in 1940 or 1941 advocated the immediate overthrow of the United States government, the infiltration of the armed forces, or the use of the Army to overthrow the capitalists.

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Nor has proof of such advocacy by the Communist Party been judicially established. *Bridges* v. *Wixon*, 326 U. S. 135 (1945); *Schneiderman* v. *United States*, 320 U. S. 118 (1943); *Kessler* v. *Strecker*, 307 U. S. 22, 30 (1938); *Ex Parte Fierstein*, 41 F. 2d 53 (C. C. A. 9th, 1930); Prettyman J. dissenting opinion in *N. M. U.* v. *Herzog*, 78 F. Supp. 146, 177, 183-5 (citing cases) D. C. D. C. (1948). Moreover, the trial court charged the jury that the question of whether or not the Communist Party advocated any such acts was not material to the case. "Nor, might I add, is the Communist Party on trial here. We are not concerned with the virtues or vices of the Communist Party." (R. 42). The quoted evidence as to petitioner's advocacy of such acts, therefore, does not establish his membership in the Communist Party.[23]

That evidence, however, does tend to establish that petitioner had committed other separate, independent crimes under the New York Criminal Anarchy Act, the Seditious Conspiracy Act and the Alien Registration Act, 1940 (Appendix p. 2). Consequently, it was relevant, if at all, only to prove his disposition or propensity to commit crimes generally and, therefore, to commit the crimes with which he was validly charged in the indictment.

It has long been established that evidence of other separate crimes, not charged in the indictment and relevant only to show disposition to commit crimes, is inadmissible against

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[23]The court's argument here imputes petitioner's advocacy to the Communist Party, and on the basis of such advocacy by the Communist Party, imputes membership in the Party to petitioner. Such a reverse attempt to establish guilt by association runs contrary to the doctrine of the *Schneiderman*, *Bridges* and related cases. See Gellhorn Report on a Report of the House Committee on Un-American Activities 60 Harv. L. Rev. 1193, 1217-1218.

the accused; or stating the point differently, evidence of such other crimes is generally inadmissible, unless relevant to prove purpose or intent, or some other essential element of the crime charged,[24] and where such evidence is admissible, the jury must be instructed as to the limited purpose for which it may consider such evidence.[25]

The evidence in question is not admissible in accordance with either formulation of this principle. The False Claims Act is a statute in which specific purpose or intent is not an essential element. Its legislative history shows that purpose and intent to defraud which were essential ingredients in the statute prior to 1934 were deliberately and intentionally eliminated by amendment in that year and the statute now punishes false statements regardless of such purpose or intent. *United States* v. *Gilliland*, 312 U. S. 86 (1940). In any event, the trial court failed altogether to instruct the jury as to the limited purpose for which it could consider the evidence. That court, having denied petitioner's motion to dismiss the first nine counts and having admitted the evidence of such other crimes under the allega-

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[24] *Boyd* v. *United States*, 142 U. S. 454 (1891); *Hall* v. *United States*, 150 U. S. 76 (1893); *Boyer* v. *United States*, 132 F. 2d 12, 13 (App. D. C. 1942); *Coulston* v. *United States*, 51 F. 2d 178, 180-181 (C. C. A. 10, 1931) (citing cases); *Kempe* v. *United States*, 151 F 2d 680 (C. C. A. 8, 1945); *United States* v. *Modern Reed and Rattan Co.*, 159 F. 2d 658 (C. C. A. 2, 1947) cert. denied 331, U. S. 831; cf. Stone The Rule of Exclusion of Similar Fact Evidence, America 51 Harv. L. Rev. 988, 1007 1 Wigmore on Evidence (3rd ed. 1940) Section 194; 2 ibid Section 305; 1 Wharton Criminal Evidence (11th ed. 1935) Section 343.

[25] *Boyd* v. *United States*, 142 U. S. 454, 457-458 (1891); *Orloff* v. *United States*, 153 F. 2d 292 C. C. A. 6 (1946); *Peo.* v. *Fultz*, 109 Calif. 258, 41 Pac. 1040; *Hanley* v. *State*, 28 Tex. App. 375, 13 S. W. 142; 1 Wharton, Criminal Evidence (11th ed. 1935) Section 365.

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tions of those counts was in no position to give such a charge and, in fact, instructed the jury to the contrary (R. 36, 43). Under the trial court's ruling as to the first nine counts, petitioner was likewise precluded from requesting such a charge, although by appropriate motions, his exception to the ruling and the instructions were preserved (R. 31, 33, 46).

The evidence of the prohibited advocacy was not offered on the cross examination of petitioner but as a part of the government's case in chief to establish the allegations of the barred counts, particularly Counts III (k) and IV (k). Even if it were relevant to show petitioner's character, it would be inadmissible under the rule which prohibits the prosecution from initially attacking petitioner's character, and, in any event, from doing so by resort to particular acts of misconduct. *McKreth* v. *United States,* 103 F. 2d 495, 496 (C. C. A. 5, 1939); *Railton* v. *United States,* 127 F. 2d 691 (C. C. A. 5, 1942); 1 Wigmore on Evid. (3rd ed. 1940), Sections 57, 192, 194. If it had been offered on cross-examination, it would not have been relevant on any of the issues under the last two counts, or if relevant, its probative value would have been so slight and incidental as to be outweighed by the hostility, prejudice and confusion of issues which it created.

The fact that petitioner had advocated revolution now to a meeting sponsored by the National Negro Congress and had thereby committed a crime wholly separate from those charged in the last two counts of the indictment throws no light on the issue as to whether he had ever been a member of the Communist Party, or used the alias; whether he had denied to Panuch that he had ever been such a member or used the alias; or whether his statement to Panuch, if false, was wilfully and knowingly made. Nor

does the fact that petitioner, identified as "defendant Tony", at a Communist Party meeting had called upon young men in the Communist Party to infiltrate the armed forces, disintegrate their morale, take control of the Army and overthrow the capitalists tend to throw any light on whether that petitioner denied membership, or the alias to Panuch or whether his denial, if false, was knowing and wilful. It does, however, tend to prove petitioner's membership, if not the use of the alias,[26] by virtue of his attendance at the meeting, and perhaps by the ambiguous use of the word "we" in Drew's report of petitioner's speeches. But the prejudice to petitioner in permitting the additional testimony of other crimes so far outweighs the probative value of such evidence of membership as equally to constitute prejudicial error. This is particularly true, since such evidence of membership was wholly cumulative (cf. R. 94, 96-97, 98-99, 100-104, 105-122), the purpose of the additional testimony as to other crimes was to establish the allegations of falsity under counts which should not have been permitted to remain in the indictment or to go to the jury and the jury was not, and, under the erroneous ruling of the trial court, could not have been given precautionary instructions appropriate to its consideration of the proof of such other crimes.

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[26]Petitioner was concededly known as "Tony" because of his Italian origin and so testified before the Board of Appeals and Review of the Civil Service Commission (R. 249-250) and at the trial (R. 196). See Panuch's testimony as to petitioner's statements as to the use of the name "Tony" (R. 50). He is not charged with having falsely denied that he had ever used or was known by the name "Tony" and his identification, in this testimony, as "Tony" does not prove that he had ever used the name or been known as "Tony Whales" or that he had falsely denied having used or been known as "Tony Whales".

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If such testimony is to be defended, it must be on the theory that the testimony as to petitioner's prohibited advocacy was a part of a continuous story, which as a whole was admissible and, if it chanced, as it did, to disclose separate crimes, that did not make it inadmissible; in short, that if the evidence is relevant to prove one crime, it does not become inadmissible because it also proves another. *United States* v. *Krulewich*, 145 F 2d 76, 80 (C. C. A. 2d (1944)). It is on this theory that the government undertakes to defend the admissibility of this evidence and cites the *Krulewich* case as its authority (Brief in Opposition to Petition, p. 25, ftn. 12).

But in that case, which involves a prosecution for transporting a woman in interstate commerce for the purpose of prostitution, under the White Slave Traffic Act, the court held that the admission of evidence of the separate crime of rape as a part of the continuous story of a government witness constituted reversible error, although purpose and intent were essential elements of the crime and the trial court carefully instructed the jury as to the use to which it might put such evidence.[27]. The grounds for reversal were that even if the evidence of rape were admissible as a part of a continuous story and to prove intent or purpose, "it was at a cost more than commensurate with the dangers it involved; it greatly tended to muddle the jury and to lead them to convict the accused because he was in general so loathesome."[28]

So in this case, even if the evidence as to petitioner's advocacy of revolution now or of the infiltration of the Army by young Communists for the purpose of using the

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[27] *United States* v. *Krulewich*, 145 F. 2d 76, 81.
[28] *United States* v. *Krulewich*, 145 F. 2d 80.

Army to overthrow the capitalists was a part of a continuous story which incidentally tended to show petitioner's membership in the Communist Party, although there is no proof that the Communist Party itself advocated any such acts, and although there is no specific intent in issue to which such evidence could be deemed relevant, the danger in the admission of such evidence was greater than its relevance and tended to muddle the jury and lead them to convict petitioner because he was in general an advocate of dangerous, prohibited and repugnant views.

2. Similar considerations apply to the admission of evidence that petitioner had counselled Communist Party members to infiltrate organizations for the purpose of creating Communist front organizations and to sow resentment and discontent among Negroes by agitating questions of racial discrimination in order to recruit Party members, admitted under Counts III(e) and (h) and IV(e) and (h). (R. 5-9, App. 10-11, R. 36-37). The government contends that no such testimony appears in the record. (See ftn. 19 *supra*.) It is obvious, however, from the evidence which does appear in the record, (R. 74-78, 106-107, 112, 113, 115-117, 187) as shaped by the counts of the indictment (R. 5-9) the opening statement of the prosecution (App. 10-11), and the recitation of these counts by the trial court in his instructions to the jury (R. 36-37), that the jury could reasonably have believed that petitioner had done exactly what he was charged with having done, particularly since the trial court did not instruct the jury that the allegations of the counts, to which such evidence appears to have directed, had been abandoned. In its effect upon the jury such evidence is as prejudicial as the proof of other crimes and clearly falls within the reason for the rule prohibiting such proof, as prejudicial error.

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3. There was other evidence of different crimes admitted in evidence, to which the court below did not advert.

Thus, Panuch testified for the government, on direct examination, that one of the charges which he discussed with petitioner on June 1, 1946 was that in 1940 and 1941 "you had made a false statement with respect to your financial resources to get a job with WPA and that statement was under oath" (R. 49). To this charge, Panuch reported petitioner as having replied "Sure, I said that I didn't have any money and that I was without financial resources, to get the job, because I felt that I was competent to do the job and whether or not I had money or not was not an ethical matter of consequence" (R. 50).

Earlier, in its case in chief, the government had introduced (App. 25), Government Exhibit No. 22, a transcript of the investigation of petitioner conducted by representatives of the Civil Service Commission on November 23, 1942, containing petitioner's statements alleged to have been false under Counts V, VI, and VII (App. 26-47). Also included in this exhibit was a statement by the Civil Service interrogator that the Commission had received evidence that when petitioner and his wife had applied for relief, they had both stated to the Department of Welfare of New York City as a reason for obtaining relief, that petitioner's wife's father and mother had died prior to 1936 and they were, therefore, unable to obtain help from anyone in their immediate family (App. 33). Petitioner is reported in this exhibit as having replied that the statement was made, possibly by petitioner, but in all probability by his wife, that the statement was false in that his wife's parents were alive, and that he had in fact lived with his wife's parents five months prior to going on relief; but that petitioner was not

prepared to argue the ethical problem involved (App. 29, 33-37). On cross-examination, petitioner was asked whether he had lived with his wife's parents after 1936 (App. 64-65), whether they were now alive and in comfortable circumstances, and whether during 1939 he was visited by welfare agents of New York City, when petitioner and his wife were present and a conversation was had concerning the date and place of death of his wife's parents, to all of which he replied, over objection, in the affirmative (App. 70-71). The admitted purpose of the questions was to prove that petitioner had made false statements to welfare agents in New York in 1939, in connection with an application for relief (App. 65-72). Petitioner's objections to these questions were overruled (App. 64, 66-67, 70, 71) and his motions for mistrial (R. 31) and for new trial (R. 46) based on the admission of this evidence were denied.

Other evidence was introduced, over objections, through Panuch and Government Exhibit 22 with reference to the charge made by Panuch that petitioner's wife in 1940-1941 was a member of the Communist Party and petitioner's reported denial of the charge (R. 49-50, App. 38). On cross examination, petitioner testified, that his wife had been a member of the Communist Party (R. 231). Petitioner's objections to the admission of this evidence were overruled (R. 231, App. 126) and his motions for a mistrial and new trial, based on the admission of this evidence were denied (R. 31, 46).

None of these accusations of false statements were charged as crimes under any part of any of the counts of the indictment; all were first introduced as a part of the government's case in chief principally in connection with

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the admission of the proof under the first nine counts, before petitioner had put his character in issue, and were, in any event, a resort to particular acts of misconduct to prove petitioner's bad character (App. 72)[29]; and all tended to prove other crimes of perjury (R. 49) or false statements, at other times, on different subjects, to representatives of other governmental agencies, federal and local, from those charged in the last two counts. They were not relevant in the trial of those two counts, except to prove petitioner's disposition to commit similar crimes. Their admission was, therefore, prejudicial error.[30]

C. Prejudicial Error in the Admission of Evidence of Other Similar Crimes.

In substance, petitioner's nine statements to the F. B. I. and the Civil Service Commission in 1942-1943 admitted under the barred counts were the same as (Counts I, V, VI, and VIII), similar to (Counts II, III, and IV) and different from (Counts VII and IX) petitioner's statements to Panuch in 1946, admitted under Counts X and XI. (Tr. 116, 118-120, R. 244-245; Tr. App. 26, 44, R. 247-249; Tr. 323, R. 249-250; R. 49-50). In other respects, as we have pointed out, the statements are wholly different from each other (Point II A *supra*). Nevertheless, the court below held that all such statements were the same or similar, that the evidence that petitioner had made these statements in 1942-1943 would have been admissible in a trial limited to the last two counts, and that no prejudicial error resulted from the admission of those statements at the trial. (R. 277-278).

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[29]See p. 23, *supra*.

[30]See cases cited in note 24 *supra*.

The court below based this conclusion on the ground that

> "If the defendant had been on trial for only his two 1946 statements, the issue would have been the truth or falsity of those statements. . . . Evidence that he had been a member and used the alias in 1940-1941 was thus clearly admissible. *That admissibility could not be nullified by the mere fact that he made the same statements in 1942* (Under Counts I, V, VI and VIII). *And we do not see that evidence that he had made the same statements in 1942 was prejudicial to him upon a trial as to the 1946 statements; in fact, it would appear to have been beneficial, in that it showed that he had consistently from a time close to the event maintained the same position. . . . That he denied in 1942* (with respect to Counts II, III, IV, VII and IX), *as he did in 1946, that he had ever done any of those things* (*attended meetings of the Communist Party, contributed services to it, participated in many of its activities, and made speeches consistent with its policies*) *does not seem to us prejudicial to him upon a trial of the issue whether he had or had not ever been a member of the Communist party. Here again his undeviating consistency of position would seem to have been beneficial rather than prejudicial* (R. 277, italics supplied).

The court below thus held that the evidence of the 1942-1943 statements was not only admissible but beneficial to petitioner.

The government seeks to support this argument primarily on the latter ground. It assumes, *arguendo*, that evidence of petitioner's 1942-1943 statements would not have been admissible, but justifies their admission as harmless if not beneficial (Brief in Opposition to Petition, p. 26).

1. The first difficulty with this argument, on the question of admissibility, is that even if the substance of the

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1942-1943 statements is the same as that of the 1946 statements, the crimes established by their admission in evidence, under the indictment and the trial court's instructions, are undisputably different from those established by admission in evidence of the statements under the last two counts (R. 25-26). *Ebeling* v. *Morgan*, 237 U. S. 625 (1915); *Blockburger* v. *United States*, 284 U. S. 299, 301-304 (1932). For this reason, the trial court, having refused to dismiss the indictment on the ground that it charged the same offense in a multiplicity of counts, denied petitioner's motion before verdict to compel the government to elect, instructed the jury to return a verdict as to each and every count, and sentenced petitioner on all eleven counts (R. 22, 26, 31, 33, and 36). If the court below is correct, the trial court was wrong, and its error in these respects is reversible.[31]

2. The second difficulty with the argument on admissibility is that the crimes established by the admission of the first nine statements as submitted were not only separate, but collateral and independent offenses, in relation to the crimes established under the last two counts alone. The first nine statements were made three and four years earlier than the last two, to other representatives of different government agencies, under different circumstances, and in two instances, on a different subject matter. Moreover, the nine earlier statements were made at a time when petitioner had just begun to work for the government, at the early stage of the war, before the Civil Service Commission had rated him eligible for continued government employment, before peti-

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[31] *Braverman* v. *United States*, 317 U. S. 49 (1942); *Cain* v. *United States*, 19 F. 2d 472, 476 (C. C. A. 8, 1927); *Patrilo* v. *United States*, 7 F. 2d 804 (C. C. A. 8, 1925). See *Kotteakos* v. *United States*, 328 U. S. 752 (1946).

tioner had been inducted into the Army and when petitioner was desirous of further government employment. The last two statements were made after the war was over, after petitioner had been honorably discharged from the Army, long after he had been rated eligible and when he no longer desired further government employment but wished to resign for the purpose of entering private employment as a producer of films for labor unions, although unwilling to resign under fire (R. 178, 180-181, 59-63, 200-201; App. 58-60).

At the trial, the nine earlier statements were admitted to prove that petitioner had lied on nine prior occasions, and had thereby committed nine separate and independent crimes. In relation to the last counts alone, the only relevance of the nine earlier statements as actually submitted was to show petitioner's criminal disposition to lie and to commit similar offenses.

The admissibility of the evidence as submitted may be tested by asking to what else, other than disposition, it had relevance in the trial of the last two counts. The nine statements were clearly irrelevant to show that the last two statements were false or fraudulent. Denial of membership and of the use of the alias, however often repeated, does not tend to show the fact of membership or the use of the alias. They were equally irrelevant to show that petitioner made the last two statements. The making of certain statements in 1942 and 1943 does not show the making of any statements in 1946. They were also irrelevant to show that the last two statements were made with any specific intent. As we have already pointed out, the statute makes false statements criminal regardless of specific intent, and no such issue was involved in the trial of the last two counts. *United States* v. *Gilliland, supra.*

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Were the nine statements relevant to the issue of general intent or knowledge and wilfulness, which was involved in the trial of the last two counts? Although the trial court did not instruct the jury as to the meaning of knowledge or wilfulness, it did define "feloniously" as meaning "with criminal intent or with intent to commit the crime charged in the statute" (R. 41). To this extent, the quesion of general intent and thus of knowledge and wilfulness, was defined as an issue to the jury. (See *United States* v. *Goldsmith*, 137 F 2d 393, 394 (C. C. A. 2, 1943), cert. denied 309 U. S. 678; *United States* v. *Center Veal and Beef Co.*, 162 F 2d 766, 772 (C. C. A. 2, 1947); *United States* v. *J. Greenbaum and Sons, Inc.*, 123 F 2d 770, 773 (C. C. A. 2, 1941)). But the fact that intent is in issue is not enough to let in evidence of similar offenses unless they are so connected with the offense charged in point of time and circumstances as to throw light upon the intent. *Boyer* v. *United States*, 132 F 2d 12, 13 (App. D. C. 1942). Here, as we have pointed out, the nine statements to the F. B. I. and the Civil Service Commission in 1942-1943 were unconnected in point of time and circumstances with the two statements in Panuch in 1946.[32] Petitioner's intent to commit the crime charged in the statute, or his knowledge and wilfulness, were no more apparent from his earlier statements than they were from his last two statements. Nor

[32]Petitioner's 1942-1943 statements admitted under Counts VII and IX denying that he had made speeches against conscription do not establish that he denied membership and the alias to Panuch in 1946; has no logical tendency to prove that his 1946 statements were false or fraudulent, unless opposition to conscription tends to prove membership in the Communist Party; and throws no light on whether, if his 1946 statements were false, they were made wilfully, knowingly or with intent to commit the crime charged in the statute.

is this a case of peculiar coincidence in which mere recurrence throws light on mental states.[33]. Though the repeated passing of counterfeit money tends to show knowledge of its character, the repeated passing of money does not tend to show that it is counterfeit. And, in the present case, the fact that petitioner had made certain statements to the F. B. I. and the Civil Service Commission in 1942 and 1943 throws no light whatever on the question of whether those statements were false, whether he knew them to be false, or whether he intended to commit the crime charged in the statute when he made them again to Panuch in 1946. The nine statements are, therefore, irrelevant to any of the issues involved in the trial of the last two counts.

Considered wholly apart from the context of the actual trial, no one of these statements in itself would be prejudicial in the trial of the last two counts. Considered in that context, however, including the indictment as a whole, the opening statement of the prosecution, the nature of the government's case in chief, the purpose and effect of the introduction of the nine statements in evidence, and the trial court's instructions, these nine statements constitute the *sine qua non* of the proof of nine separate similar crimes, whose only relevance, in relation to the trial of the last two counts alone, was to show petitioner's disposition to commit crimes.

Boyer v. *United States,* 132 F. 2d 12, (App. D. C. 1942) is directly in point. There, the accused was convicted under false pretense indictments for having sold warehouse receipts representing whiskey to two witnesses by means of fraudulent representations that he was a representative of a certain distillery and that the receipts would

[33]Cf. 2 Wigmore on Evidence (3rd ed. 1940) Section 302ff.

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double in value in two years. The false pretenses statute involved requires the specific intent to defraud as an essential element of the crime. The government called a third witness, Littlepage, who testified that about two years before the acts for which the accused was on trial, the accused had sold this third witness similar warehouse receipts and had made to her the same representations which he was charged with having made to the complaining witnesses. This testimony was offered, over objection, and admitted on the theory that it showed the intent to defraud. The Court of Appeals reversed the conviction, because of admission of this testimony, despite the fact that the trial court, upon reflection, instructed the jury to disregard it. Even though the specific intent to defraud was in issue and the evidence was offered specifically to show that intent, the court held that the fact that the accused "had made a certain statement to Littlepage throws no light whatever on the question whether it was false or whether he knew it to be false, or whether he intended to defraud when he made the same statement to (the two complaining witnesses)" (ibid. 13). It held, moreover, that the testimony in question, in the circumstances of the case, established proof of other crimes, irrelevant except to show disposition to commit similar crimes, and that the prejudicial error in its admission was too great to be cured even by the trial court's instruction to the jury to disregard it.

> "No doubt the alleged fact that a man committed a crime on another occasion tends to show a disposition to commit similar crimes. But when the prior crime has no other relevance than that, it is inadmissible. Its tendency to create hostility, surprise and confusion of issues is thought to outweigh its probative value. The law seeks 'a convenient bal-

ance between the necessity of obtaining proof and the danger of unfair prejudice."[8] The alleged fact that a man committed one forgery clearly increases the likelihood that he committed another forgery, but testimony to the earlier crime is not, for that reason alone, admissible.[9] We think the Littlepage testimony is within that principle."

"[8]Note (1931) 29 Mich. L. Review 473, 480."

"[9]*Laughlin* v. *United States*, 67 App. D. C. 355, 92 F 2d 506, cf. *Witters* v. *United States*, 70 App. D. C. 316, 106 F 2d 837, 125 A. L. R. 1031."

In the case at bar, the prejudicial error in the admission of the first nine statements in relation to the last two counts alone is even greater than the admission of the earlier statements in relation to the later statements on trial in the *Boyer* case. Here, the evidence of the earlier statements was not admitted dehors the indictment but under nine counts which specifically charged such statements as crimes; the prosecution did not offer such statements on the issue of specific intent which is not, in any event, a constituent element of the crime charged by the statute here involved, but as a part of its case in chief to prove the nine crimes charged in the indictment; and the trial court did not instruct the jury to disregard the first nine statements but on the contrary misdirected the jury to consider such statements with respect to each and every one of the counts.

The misconception which led the court below to hold the first nine statements relevant and not prejudicially erroneous arose, we suggest, because of its failure to distinguish between the statements as submitted in the context of the actual trial and the harmless effect which they would have had in a hypothetical trial, abstracted from the

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context and limited to the last two counts, where, if offered by petitioner they might have been relevant to corroborate the statements involved in the last two counts.

3. But even if, as actually submitted, the nine statements could be construed as relevant to any of the issues in the trial of the last two counts alone, and would have been admissible to prove the crimes validly on trial, although they also proved others, their admission in the circumstances of this case was nevertheless prejudicial error.

Petitioner was entitled to correct instructions that he was on trial for two crimes, not eleven. *A fortiori*, he was entitled to precautionary instructions that the evidence of other crimes was admissible only on the issue in the trial of the last two counts to which it was relevant.[34] Such instructions would have avoided the danger that the jury would convict petitioner of the crimes charged in the last two counts, merely because it believed him guilty of the nine crimes for which he was not validly on trial. But such instructions were not, and under the trial court's erroneous ruling with respect to the first nine counts, could not have been given or requested. Instead, the trial court misdirected the jury to consider all of the evidence, including the first nine statements, with specific reference to the first nine counts of the indictment, and with all the opprobrium attaching to such evidence by reason of the indictment and misdirection. The first nine statements were, therefore, not submitted as mere statements, devoid of criminality, as they might have been, if, under a correct ruling, the trial had been limited to the last two counts and petitioner had offered such statements on his own behalf to show his

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[34] *Orloff* v. *United States, supra; Boyd* v. *United States, supra;* 1 Wharton Criminal Evidence (11th ed. 1935) Section 365.

consistency of position. Nor were they submitted as bearing only on some essential element of the crimes charged in the last two counts, as they should have been, under precautionary instruction, if the trial had been limited to those two counts alone. Under the trial court's erroneous instruction, they were submitted, without limitation, as the *sine qua non* of the government's case in chief as evidence of nine separate offenses, for which, as it turned out, petitioner was not validly on trial. Where evidence of similar offenses is admissible, the failure of the trial court, upon request, to instruct the jury as to the limited purpose for which it may consider such evidence is prejudicial error. *Orloff* v. *United States, supra.*

Here, where such an instruction could not have been given or requested, and where the erroneous instructions as given permitted the jury to convict petitioner of crimes for which he was not validly on trial, the error is no less prejudicial

4. Under the decisions, such an error is presumed on principle and for reasons of policy to be prejudicial. Here, the error was aggravated by the difference between the nature and circumstance of the statements under the two sets of counts.

Under the trial court's erroneous instructions, the jury must necessarily have been prejudicially influenced in reaching its verdict on the oral, informal and unsworn statements admitted under the last two counts, especially on the issue of knowledge and wilfulness, by the evidence of the documented, formal and sworn statements, admitted under the nine barred counts, particularly in the light of the opening statement for the prosecution, the array of witnesses who were summoned to identify the proof of the nine earlier

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statements, and the submission to the jury of the indictment itself, in full, during its deliberations. Under these circumstances, the inference is fairly compelled that with the evidence of the 1942-43 statements before it, the jury concluded that petitioner, having lied on nine previous occasions under oath was a chronic, consistent and criminal liar on this very subject, as well as others, and, *therefore*, knowingly, wilfully and criminally lied in his unsworn statements to Panuch in 1946. The question is not whether the jury was right in its verdict, regardless of the error in the admission or submission of the 1942-1943 statements, but rather what effect those errors had or may be reasonably taken to have had upon the verdict, the test being the impact of the error, not of the appellate court, but of the jurors in the total setting. *Kotteakos* v. *United States, supra.* Here, the error in the admission of evidence of other similar crimes, irrelevant except to prove disposition, was compounded by the erroneous instructions to consider that evidence, without limitation, on the issues in the trial of all eleven counts.

That such errors were prejudicial is not logically excluded by the argument of the court below that the first nine statements are the same in substance as the last two statements. Whether or not they are the same, the jury was required by the instructions to believe that each statement constituted an indispensable part of the proof of separate offenses, and, in that belief, must necessarily have reached the conclusion, if it believed the evidence, that petitioner had, in fact, uttered nine separate lies and had thereby committed nine separate crimes, before it reached the question of whether he had uttered other lies and committed other crimes under the last two counts. To hold otherwise is wholly to ignore the effect of the erroneous instruction.

Nor is the fact that prejudicial error was committed logically excluded by the corollary argument of the court below that "the only issue was the truth or falsity of the statements . . . if (the statements) were false in 1946, they were false in 1942, and vice versa" (R. 278). The actual issue submitted at the trial was not merely whether the 1946 statements were true or false, but whether those statements, together with nine others, were true or false, and, if false, knowingly, wilfully and feloniously made (R. 43). Had the trial been limited to the last two counts, the jury could reasonably have found that the two 1946 statements were false, but not knowingly and wilfully made, particularly in the light of the informal circumstances of their making, whereas, at the actual trial of eleven counts, the jury may well have concluded that since petitioner had criminally lied under oath nine times before in 1942 and 1943, for that reason alone, he knowingly and wilfully lied twice afterwards in his sworn statements to Panuch. The admission of evidence of the earlier crimes is prejudicially erroneous, not because it had no appreciable probative value on the issue of knowledge and wilfulness, but because it had too much, not because it had no relevance at all, but because it was relevant only to disposition. "The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge". 1 Wigmore on Evidence (3rd ed. 1940) Section 194. In the total setting of the actual trial, the error may reasonably be taken to have led the jury to a verdict of guilty on all eleven counts, whereas had the trial been on the last two

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counts alone, absent these errors, there is a reasonable possibility that the verdict would on these counts have been not guilty. The difference is between (1) the logical necessity that the jury must have reached the same verdict on two counts as it did on eleven, which the court assumes from the asserted identity of the two sets of statements and the proof of their falsity and (2) the impact on the minds of the jury of the nine prior sworn and formal statements, as submitted, in context, when it came to its deliberations as to the later informal and unsworn statements. The logical necessity is apparent only in abstraction; the reality lies in the impact of the error on the minds of the jury.

5. The argument of the court below, and the supporting argument of the government (Brief in Opposition to Petition, p. 26) that the evidence of petitioner's 1942-1943 statements was beneficial to petitioner is, we submit, sheer sophistry. The argument assumes either that unalloyed advantages accrued to petitioner from his nine earlier statements, or that the jury weighed only his last two statements against the proof of his activities in 1940-1941, without reference to the fact that it had already found him guilty of nine separate crimes, in the making of his nine earlier statements. These assumptions, like those relating to the admissibility of the evidence, do violence to the reality by abstracting the last two counts from the total setting of the trial. The nine earlier, sworn, formal and documented statements *were* considered by the jury and must necessarily have had a prejudicial effect in leading the jury to believe petitioner's general disposition to lie and thus his knowledge and wilfulness in the making of the unsworn, informal and unrecorded statements in the last two counts. If the first nine statements proved any consistency of position, the actual circumstances of the trial, they proved peti-

tioner's consistent disposition to lie and commit crimes. The unalloyed advantages to petitioner in such proof are not visible.

D. Petitioner Was Erroneously Sentenced.

The court below upheld the general sentence of one to three years' imprisonment imposed by the trial court on the jury's separate verdict as to each of the eleven counts of the indictment, on the ground of the rule in *Claasen's* case, that in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only[35] (R. 281). The record here, however, shows that the trial court thought that each of the eleven counts charged a separate, distinct and valid offense (R. 25). The trial court, therefore, must necessarily have imposed its general sentence on the basis of eleven separate convictions, as found by the jury, not on the basis of the only two which could validly have been found. In *Claasen's* case, the court mentions the fact that "the record does not show that any of the instructions at the trial were excepted to." Here, the record shows that petitioner moved to dismiss the first nine counts of the indictment before, during and after trial and excepted to the trial court's denial of motions which led to the erroneous submission of all eleven counts to the jury for verdict (R. 20, 31, 33, 46). Under these circumstances, the rule in *Claasen's* case is not applicable, *Dwyer* v. *United States,* 170 Fed. 160, 166 (C. C. A. 9, 1909), especially where, as here, because of misjoinder or other unfairness at the trial, it is mere conjecture to say that the court was not influenced by the addi-

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[35] *Claasen* v. *United States,* 142 U. S. 146 (1891).

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tional verdicts, *Fulton* v. *United States,* 45 App. D. C. 27, 42 (1916) see *C. M. Spring Drug Co.* v. *United States,* 12 F. 2d 852, 859, 861 (C. C. A. 8, 1926). On the record, it cannot be determined what part of the sentence is attributable to the verdict on the barred counts, the remaining two counts, or any of the counts separately. It cannot, however, be fairly assumed that the trial court would have imposed the same penalty for two violations of the applicable statute as for eleven separate violations which included those two. The rule in *Claasen's* case was designed to avoid a miscarriage of justice. Its arbitrary application in this case succeeds only in achieving the opposite result.

The government contends that the decision of this court in *Pinkerton* v. *United States,* 328 U. S. 640, 641-642 (1946) forecloses the argument (Brief in Opposition to Petition, p. 27). In that case, however, there was nothing in the record, as there is here, to rebut the presumption; indeed it appears that the question was never presented.[36] The government further suggests that petitioner's remedy is provided by Rule 35 of the Federal Rules of Criminal Procedure permitting application to the trial court for a reduction in sentence, within sixty days after the mandate is handed down (ibid. 27). The Rule, however, is addressed to the discretion of the trial court and does not foreclose the assertion of a right. If the general sentence on eleven counts was error, this court may correct the error or remand the case, under instructions, for resentencing. *Yasui* v. *United States,* 320 U. S. 115 (1943); *Husty* v. *United*

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[36]In its brief on the writ, in the *Pinkerton* case, in this Court, the government stated as to this point "The question is not argued either in the petition or in petitioner's brief on the merits" (pp. 10-11).

States, 282 U. S. 694 (1931); *Dwyer* v. *United States, supra; C. M. Spring Drug Co.* v. *United States, supra; Fulton* v. *United States, supra;* see *Braverman* v. *United States*, 317 U. S. 49 (1942).[37]

E. Conclusion.

The trial court's error in denying the motion to dismiss the first nine counts of the indictment permeated the entire trial. It permitted the prosecuting attorney in his opening statement and the trial court in its instructions to put before the jury, as additional and different issues on the trial, accusations of crimes which were barred, and numerous allegations of prejudicial matter which should never have been included in the indictment. It led to the improper admission of evidence of nine separate crimes under the False Claims Act, of other irrelevant crimes under other federal and state laws, and of other prejudicial matter in the nature of crimes, which prejudicially affected the verdict. It prevented petitioner from objecting to the admission of evidence and from requesting precautionary instructions. It permitted the jury to find petitioner guilty of nine crimes for which he was not validly and led the trial court to misdirect the jury and to impose an erroneous sentence based on counts, which should not have been submitted.

In the total setting of this case, these errors cannot be dismissed as harmless. The evidence against petitioner is not so strong or overwhelming that any reasonable jury, had there been no error, could not have reached a different

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[37]Under Revised Title 18 U. S. C., Section 1001, effective September 1, 1948 (based on Title 18 U. S. C. 1940 ed. Section 80), the maximum punishment has been reduced from ten to five years "to harmonize the punishment provisions of comparable sections involving offenses of the gravity of felonies, but not of such heinous character as to warrant a 10-year punishment" (Reviser's Notes Section 287.)

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verdict. Of the three chief witnesses for the prosecution, one was a self-confessed perjuror (R. 117-120, 129-139), the second a former member of the Communist Party, whose testimony was in conflict in material respects (R. 70, 71, 78, 127-128) with that of the third witness, a police spy and *agent provocateur* (R. 88-89), whose testimony is subject to serious reservations as to its reliability, cf. *Colyer* v. *Skeffington*, 265 Fed. 17, 69 (D. C. Mass. (1920)). Petitioner did not admit his guilt but took the stand to deny it vigorously in every material respect. Under these circumstances, we submit, the permeating error of the trial court substantially and prejudicially affected the verdict. *Kotteakos* v. *United States, supra.*

Point III

THE COURT BELOW ERRED IN SUSTAINING THE JUDGMENT ON COUNTS X AND XI, BECAUSE OF THE APPLICATION BY THE TRIAL COURT OF A UNIQUE STANDARD FOR THE ADMISSION OF EVIDENCE RELATING TO NEGROES AND A NEGRO ORGANIZATION, BASED ON THE SUPPOSED SUSCEPTIBILITY TO PREJUDICE OF THE PREDOMINANTLY NEGRO JURY IN THE CASE, CONTRARY TO THE PUBLIC POLICY OF THE UNITED STATES, AND IN DEPRIVATION OF PETITIONER'S RIGHTS TO DUE PROCESS AND AN IMPARTIAL TRIAL BEFORE A REPRESENTATIVE JURY, UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION.

Petitioner contended in the court below that the trial court improperly excluded admissible and important evidence relating to Negroes and the National Negro Congress, because of the supposed inability of the predominantly Negro jury in the case to weigh such evidence on the same terms as any other representative jury.

It is clear that such a test, if, in fact, applied, would violate petitioner's rights under the Fifth and Sixth Amendments to the Constitution. For some seventy years, this Court has held in a variety of circumstances that the systematic exclusion of Negroes from grand and petit juries solely on the ground of race or color constitutes a denial of constitutional rights to the accused. *Patton* v. *Mississippi*, 332 U. S. 463 (1947) and cases there cited. For similar reasons, this Court has condemned the systematic exclusion of wage-earners, see *Thiel* v. *Southern P. Co.*, 328 U. S. 217 (1946), and women, see *Ballard* v. *United States*, 329 U. S. 187 (1946) from jury lists. It follows, inescapably, we think, from this Court's insistence that the constitutional guarantees require the selection of a representative jury, without exclusion because of race, color, economic status or sex, that, once properly selected, the jury must be treated, throughout the trial, as a representative jury.

In the court below, the government conceded that the application of such a test for the admissibility of evidence would violate petitioner's constitutional rights[88] but contended—and was sustained therein by the court below—that such a test was not applied and, in any event, the rulings complained of were correct.

The issue presented requires an analysis of the evidence which was offered and excluded, the rulings of the trial court with respect to such evidence and the justification advanced in support of those rulings.

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[88]"All this is merely to say that a court must not permit racial make-up, economic status or sex of the jury to govern or affect its rulings on the admission or rejection of evidence. With the proposition so stated, the government could take no issue" (Brief for Appellee p. 61).

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A. The Exclusion of Evidence Relating to Policy Brutality Against Negroes.

The ruling which, although not the most important in its exclusion of evidence, most clearly illuminates the basis upon which the trial court withheld evidence from the predominantly Negro jury, involved the limitation of petitioner's direct examination with reference to the subject matter of a meeting at his home, which was offered to rebut the testimony of Harper as to that meeting. Harper, a Negro, testified for the government that he attended a Communist meeting at petitioner's home, where petitioner was present, in May 1941, when representatives of the National Negro Congress met with representatives of the Communist Party in that area to see what could be done to increase the growth of the Congress and iron out its difficulties. Without interruption from the trial court, Harper testified that the difficulties of the Congress had arisen because some of its members resented the presence of whites at their meetings and attempts at Communist Party members to recruit people at such meetings who were interested in the question of rents, places to live, jobs, "questions of attempts to stop indiscriminate brutalities that were being carried on against them in particular". In answer to the question as to whether petitioner had participated in this meeting as a representative of the Communist Party or of the National Negro Congress, Harper was permitted to testify over objections that the answer called for and resulted in a conclusion, that "he operated as a representative of the Communist Party, so far as we know" (R. 76-78, 82).

On his own direct examination, petitioner attempted to rebut Harper's version of the meeting. He had begun to testify that he had met Harper at petitioner's home with

others present in middle or late 1940 and that he particularly recalled the date because of a then current incident involving the beating up of two Negroes by police from a scout car, which was the subject matter of the discussion of those present (R. 185-186). At this point, without objection from the government, the trial court interrupted, halted the examination on the ground that "we are not interested in that" and that it could have "other purposes".

Summoning counsel to the bench, the trial court stated that "This will lead right up to an attempted prejudice", that petitioner "very significantly makes use of those things" and that "the prejudice has happened here". Counsel for petitioner offered to prove that "Harper has said that at that time there was a meeting at defendant's home, which was a Communist Party meeting. We intend to show first that it was not any such thing and second what it was." Counsel for the government, however, argued that there could be no fair trial before *this* jury if you go into the beatings (R. 188 italics supplied) and at a later point, announced the government's intention to move for a mistrial, if the testimony persisted. The trial court, after repeated expressions of a desire "to go to the jury without prejudicial bias, sympathy or hatred or any feeling for or against" requested petitioner's counsel to proceed from the point of interruption without making futher reference to the incident of police brutality and to approach the bench before going into similar matters in the future (R. 186-189).

Under these limitations, petitioner was allowed to testify in the most general terms, and under specific admonitions from his counsel not to mention the incident, that a certain incident had occurred in the neighborhood, that he advised those present to have the witnesses to the incident draw up

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a letter to the Police Commissioner about it, that the meeting was not a Communist Party meeting, that nothing about Communism was mentioned and that nothing other than what petitioner had described in a general way took place (R. 189-190).

We submit that the testimony which the trial court refused to allow under these circumstances was relevant, competent and material to the case. It related to the only meeting at petitioner's home to which Harper had testified (R. 82). Harper had testified that the subject matter of the meeting was the role of the Communist Party and the National Negro Congress. Petitioner was prevented by the ruling of the trial court from testifying affirmatively as to what was actually said and done by Harper, petitioner and others on a different subject matter and was required to testify negatively, in conclusions, and in "a general way".

The court below, without a specific ruling, apparently concluded that this limitation on petitioner's direct examination was justified first because the trial court was seeking to prevent further outbursts by petitioner, similar to those which he had previously made and which the trial court had stricken with reference to the F. B. I. and the State Department (R. 177-178, 56-57, 186-187), and second, because, in the resumed examination, although counsel for petitioner protested the ruling, the trial court said "All right" and the examination proceeded without interruption (R. 190, 279). Petitioner's so-called outbursts, however, related to a wholly different matter. Since the testimony which petitioner sought to give in his version of the meeting would have served to contradict Harper's version of the meeting, such testimony should have been permitted, even if other unrelated testimony was properly stricken. Moreover, it is not

to be supposed that in giving the answer "All right", when counsel for petitioner protested the limitation in his resumed examination before the jury, the trial court was undoing, in two non-committal words, what it had been at pains explicitly to prohibit when it had summoned counsel to the bench. The limitation cannot be justified on the ground that petitioner's counsel followed it under protest.

The government in the court below sought to justify the ruling on the ground that Harper was testifying about one meeting in May 1941 and petitioner about another in middle or late 1940 and that petitioner's testimony could not serve to contradict Harper's (Brief for Appellee, p. 49). But, the record is clear that the only meeting at the home of petitioner to which Harper testified and the only meeting with petitioner which he described as a Communist meeting was the meeting here in question (R. 75-76, 82, App. 60-61).[39] There was thus on Harper's own testimony only one meeting involved and petitioner's proffered and excluded testimony was in direct conflict on a material issue in the case with that given by Harper with respect to that meeting. To

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[39]The government conceded that "Harper testified concerning but one meeting at the home of defendant", but argued that "at no place in the record was Harper specifically asked, nor did he state that he had been *in* defendant's home but once" (Brief for Appellee, p. 50, ftn. 18). Harper, in fact, testified on cross examination:

> Q. And you have visited him (Marzani) at his home, haven't you?
>
> A. I went to a meeting there.
>
> Q. You visited his home. You went to his home, didn't you?
>
> A. To a meeting, yes (R. 82).

The only testimony by petitioner as to any meeting with Harper at petitioner's home is the meeting here in question (R. 190-191).

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hold otherwise would be to say that Harper's testimony as to the date of the meeting was conclusive and that petitioner was not entitled to contradict it. The limitation on petitioner's testimony was, therefore, error.

B. Limitation on the Cross Examination of Drew, as to His Activities as an Agent-Provocateur.

The second and most important series of ruling involved the trial court's limitation of the cross examination of Drew, with respect to his role as a police spy and *agent-provocateur* in the National Negro Congress.

Drew testified on his direct examination that about a year after he had passed his recruit examination and had become a member of the New York Police force, he was selected as an undercover agent for a unit of its Undercover squad (R. 88). This squad was originally organized shortly after the outbreak of World War II to investigate various organizations in New York City which had been designated by the Police Department as subversive (R. 64-65). The unit to which Drew was attached was under the supervision of Captain Gallagher and consisted of some thirty young police officers, male and female, especially selected because of their varying backgrounds, after "a thorough loyalty check", to investigate particular "subversive" organizations. Drew was selected because he was a Negro (R. 166). He was assigned to and did investigate the Communist Party and in that connection a local branch of the National Negro Congress (R. 64-66, 70). With other members of the squad, he was instructed by Captain Gallagher to infiltrate himself into such subversive organizations, "advance themselves in those organizations by working as closely as they could with the people in those organizations and to try to

capture such jobs as secretary of the organization which would give them access to the lists of members' names and letters, and to provide them with the best opportunity for making notes of the activities of the organizations" (R. 66), and to make daily reports on such matters to the Police Department (R. 90). Under the instructions of Captain Gallagher, Drew's operations, like those of the other members of the squad, were conducted with the greatest secrecy and strictly under cover. He moved away from his home in Long Island to a room in Harlem, assumed the alias Bill Easley, and posed as a railway clerk employed by the Board of Transportation. For this purpose he was furnished with the necessary false identification papers and his identity was concealed from his family, his friends and other members of the Police Department. He made nightly written reports to and received his weekly paychecks from a separate headquarters in the downtown business district, ostensibly operating as an advertising agency, later a merchandise surveying firm, run by Captain Gallagher who was known as Martin Pearson, the head of the firm (R. 89).

Drew's first assignment in July 1940 was in Harlem. In this assignment he failed completely. "No results at all" (R. 89). He then transferred his activities to the East Side. His testimony about his activities there in 1940-1941 in the Communist Party, and in local branch of the National Negro Congress, in relation to petitioner, furnished the principal evidence that petitioner's statements under all eleven counts of the indictment were false. This testimony involved some twenty-six meetings with petitioner, twenty-three of which were described as having taken place at Communist Party headquarters, or as under Communist auspices, or otherwise as Communist meetings. Except for two of these meetings about which Harper testified, only one

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of which was asserted to be a Communist meeting, Drew's testimony is uncorroborated.[40]

Included in Drew's direct testimony, describing petitioner's relationship to the Communist Party, were incidental references to Drew's activities in connection with the East Side Branch of the National Negro Congress. He testified that, at Communist Party headquarters, he had "explained to (petitioner) *the work I was doing in organizing the National Negro Congress. I explained how I had gotten the aid of several Negroes that had been Communist Party members and we were doing a very good job of getting the Congress started on the (East) side* (R. 106, italics supplied); that he had been chairman or master of ceremonies at a dance sponsored by the National Negro Congress of the East Side (R. 111) and on another occasion had been one of the principal speakers at an open meeting of the Congress at a church where Congress literature had been distributed and a collection had been taken up (R. 115); that he had made frequent detailed reports to and had sought guidance from Communist Party officials on the membership, aims, prospectus and literature of the Congress (R. 112, 113) *". . . the organization of which I was head"* (R. 112, italics supplied); that with petitioner he had composed a leaflet for the Congress about discrimination (R. 113); that he had met with members of the Congress and the local executive committee of the Communist Party to consider the reasons for the downfall of the Congress on the East Side and how to rebuild it without the visible aid of the Communist Party (R. 117); that he had

[40]See Government Brief in Opposition to Petition pp. 8-16 enumerating the meetings. Hewitt's testimony that he met petitioner on two occasions (R. 257-258, 260-261) does not corroborate Drew's testimony, since Drew did not testify as to such occasions, although Hewitt said Drew was present at one of them.

suggested that Harper as a member of the Congress be the representative of the Congress in another organization, and Harper was so selected (R. 121); and that he had made nightly reports to the Police Department, at its separate headquarters, as to all these activities. The record incidentally indicates that these reports included the names of those present at such meetings (R. 90-91, see Note R. 97, 115-117, App. 61).

During the course of his direct examination, Drew testified as to his personal history and schooling (R. 87-88), and later as to a conversation with petitioner in which Drew stated how he happened to join the Communist Party. "I told him that being a Negro, southern born, I was against discrimination and so forth and that I wanted to help my people, as well as all minorities . . . 'the only people I could turn to were the Communists', that I was interested and wanted to be with them" (R. 105).

On cross examination, petitioner began to question Drew about these activities and Drew's role in the local branch of the National Negro Congress. The questioning had brought out that Drew had organized the branch with the help of others around September 1940 and had solicited members for it (R. 123), when, without objection by the government, the trial court halted the examination, requested counsel to approach the bench, and asked the purpose of the examination.

Mr. Ford. . . . (Drew) testified on the stand yesterday that after giving his history and his schooling, this witness on direct, he said he always had his people——

The Court (interposing). Who, this witness?

Mr. Ford. Yes, sir.

The Court. I don't recall that.

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Mr. Kelley. And I don't recall that either.

Mr. Ford. Well, it is on that basis that I am saying that. I may be wrong.

The Court. Yes, that isn't my recollection.

Mr. Ford. But because I believe that will show that——

The Court (interposing). I will deny that part of it at this time, sir.

Mr. Ford. Yes sir. And if the record turns out that I am correct, had I been permitted, I would have developed that he did the following things:

First, *because of the testimony of the captain who organized the squad who said that the National Negro Congress was one of the organizations that he delegated them to investigate—I am going to show that he created, this witness, that organization, that he had people other than Communists come and address the association; that the people he solicited were colored people and other nationalities;* and

Secondly, again as to the meeting he testified of the National Colored Congress being held in that church and he described all of its details and what was stated by each. *I want to develop all those phases of it under the heading of National Negro Congress.*

The Court. I will not hear you on anything of that sort save those meetings where he specifically attended sir, and where Mr. Marzani was in attendance.

Mr. Ford. That is your Honor's ruling?

The Court. Yes.

Mr. Ford. May I have an exception on on this limitation of cross examination (R. 124-125, italics supplied).

Pursuant to this ruling, the trial court subsequently refused to permit counsel for the petitioner to ask Drew whether or not he had previously testified that he was al-

ways out to help his people, colored people (R. 126). The trial court again stated his erroneous view that Drew had not so testified (R. 126).

Counsel for petitioner further stated that he desired to cross examine Drew on matters which the government had put into this case which went beyond the issue of whether petitioner's statements were made wilfully and falsely, and also for the purpose of questioning Drew's credibility. The trial court ruled that, as to matters outside the issues, petitioner would be permitted to go into anything brought out on any of those occasions, as to which there is testimony, but as to credibility, "I will not go into that. I will permit you to go into and attack his credibility as to anything he has dealt with on those particular occasions" (R. 125). No further questions relating to these matters were thereafter permitted (R. 128-129).

These rulings may be summarized as follows:

1. Cross examination of Drew as to his role in the National Negro Congress would be permitted only as to meetings about which Drew had testified and where both Drew and petitioner were in attendance.

2. Cross examination of Drew was forbidden as to his testimony, given as a reason for joining the Communist Party, that he wanted to help the Negro people, even to the extent of refusing to permit the preliminary inquiry, required as a basis of contradiction, as to whether he had so testified.

3. Cross examination of Drew for the purpose of attacking his credibility would be forbidden, unless limited to particular occasions about which he had testified on direct examination.

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4. Cross examination as to matters not directly related to the issues would be limited to occasions as to which Drew had testified on direct examination.

These rulings are prejudicially erroneous because they improperly limited petitioner's right of cross examination on vital issues in the case.

"A full cross examination of a witness upon the subjects of his examination in chief is the absolute right not the mere privilege of the party against whom he is called and a denial of this right is a prejudicial and fatal error. It is only after the right has been fully and fairly exercised that the allowance of cross examination becomes discretionary." *Heard* v. *United States,* 255 F. 829, 832 citing cases (C. C. A. 8, 1919); *Alford* v. *United States,* 282 U. S. 687, 691 (1931).

"Cross examination . . . is necessarily exploratory; and the rule that the cross examiner must indicate the purpose of his inquiry does not in general apply . . . It is the essence of a fair trial that reasonable latitude be given the cross examiner even though he is unable to state to the court what facts a reasonable cross examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to the test, without which the jury cannot fairly appraise them." *Alford* v. *United States,* 282 U. S. 687, 692.

In the light of these applicable principles, petitioner is entitled to all the inferences as to the sufficiency and scope of his proposed cross examination which may fairly be drawn from his offer of proof and from Drew's direct testimony to which it related. *McCandless* v. *United States,* 298 U. S. 342, 346 (1936). The proposed inquiry related to subject

matter of Drew's direct examination; it was necessarily exploratory; and the trial court interrupted it, to require a statement of purpose, which was given, in part specifically, and in part generally, although such a statement of purpose is not generally required. The offer was objected to on the grounds of materiality, not of sufficiency, and, "if it had been . . . suggested that the offer was incomplete, it is not unfair, when we consider the nature of the specific matters named, to assume that the evidence in respect of them could have been supplied". *McCandless* v. *United States, supra.*

Consideration of the issue will be facilitated, therefore, by restating petitioner's offer in the detail which could have been supplied, had its sufficiency been questioned, and by examining the rulings of the trial court, in the light of the applicable principles cited above.

Accordingly, the first object of the proposed cross examination was to show, with reference to the subject matter of the direct examination, that Drew had been instructed by Captain Gallagher to infiltrate an existing branch of the National Negro Congress which had been designated as subversive by the Police Department and to report on the names of its members and activities; that, having failed to find any such subversive organization in existence in Harlem or on the East Side, Drew had created one, become the head of it, chaired its meetings, solicited members for it, written pamphlets to induce others to take action in accordance with its aims, sought and obtained the help of the Communist Party for it, spread its influence by placing its representatives in another organization and sought to resuscitate it when it met its downfall; that he had simultaneously reported its members and activities to the Police Department, and that by such misconduct, he had exceeded his authority and acted as an *agent provocateur.*

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The trial court, however, refused to permit a cross examination of Drew upon these subjects of his direct examination, unless the cross examination was subject to the three-fold limitation that it relate to meetings about which Drew had testified, where Drew specifically attended and where petitioner was in attendance (R. 125). Even under the narrowest form of the Federal rule respecting the scope of cross examination, these limitations are without justification in applicable decisions. "A party has . . . (the) right to cross examine any witness . . . as to facts and circumstances connected with the matters stated in his direct examination." *Philadelphia T. R. Co.* v. *Stimpson,* 14 Pet. 448, 461, 10 L. Ed. 535. "The right of cross examination is not confined to the specific details of the direct examination, but extends to the subject matter inquired about." *Dewitt* v. *Skinner,* 232 F. 443 (C. C. A. 8, 1916); *Heard* v. *United States,* 255 F. 829, 832, 834 (C. C. A. 8, 1919) and cases there cited. Wigmore on Evidence (3rd ed. 1940), Sections 1885-1887, 1890.

Under this three-fold limitation, petitioner was denied the right to a full cross examination of Drew along these lines because, although all of the subjects involved were included in Drew's direct examination, many of them did not occur at meetings or on occasions when both Drew and petitioner were present. Thus, Captain Gallagher's instructions to Drew were necessarily outside the presence of petitioner; Drew's activities in soliciting members and in reporting such members to the Police Department did not occur at meetings at which both petitioner and Drew were present; Drew's initial activities in organizing the local branch of the Congress, which he subsequently explained to petitioner, were obviously not participated in by

petitioner; and the record clearly demonstrates that Drew's appointment or election as the head of the local branch took place at a meeting or on an occasion when petitioner was not present (R. 112). These limitations on the cross examination of Drew prevented petitioner from placing Drew in his setting as an *agent provocateur* by reference to activities about which he had testified on his own direct examination and were, therefore, prejudicial error. *Alford* v. *United States, supra.*

The second object of the proposed cross examination was to show that Drew had testified falsely on his direct examination when he told petitioner that as a Negro, southern-born, he was against discrimination and wanted to help his people as well as all minorities. Petitioner was entitled, if not required, to recall this statement to Drew on cross examination as a foundation for contradicting it, by showing that Drew had himself obtained members for an organization which his superiors had designated as subversive, had turned their names over to the Police Department as subversives, had trafficked in discontent to his personal advantage, and had thereby injured and not helped his people. See Wigmore on Evidence (3rd ed. 1940), Section 982, 987, 1000, 1006, 1023. The refusal of the trial court to permit petitioner to ask Drew whether he had made the statement is demonstrably based on an erroneous view of the evidence, and, since the statement was made on an occasion when both Drew and petitioner were present, it is not justified even by the trial court's own improper limitation on the scope of cross examination. This prohibition on cross examination also constituted prejudicial error. *Alford* v. *United States, supra.*

The third object of the proposed cross examination was to attack Drew's credibility by showing his bias, interest, and

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misconduct. For this purpose, petitioner was entitled, as a matter of right, to question Drew as to any subject, whether or not included in the direct examination, which would discredit or destroy his testimony on direct examination and detract from his worthiness to be believed, especially since, as noted above, his testimony was largely uncorroborated and went to the commission by petitioner of the acts relied upon for conviction.[41] Accordingly, it was prejudicial error for the trial court to restrict such questions to matters testified to on direct examination. And "no obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross examination short of an attempted invasion of his constitutional protection from self-crimination properly invoked." *Alford* v. *United States, supra.*

Here the trial court, on its own motion, assumed the obligation to protect Drew from questions, fairly included in the offer of cross examination, which would have discredited him by showing his bias, interest and misconduct. Petitioner was entitled to enquire of Drew as to the "thorough loyalty check", which, according to Captain Gallagher, he had undergone before his selection as a member of the Undercover squad, to determine whether he had any bias against the National Negro Congress, which would lead him to report its activities or the activities of persons such

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[41] *Alford* v. *United States, supra,* and cases there cited; *District of Columbia* v. *Clawans,* 300 U. S. 619, 630-631, 632 (1937); *Majestic* v. *Louisville & N. R. Co.,* 147 F. 2 621 (C. C. A. 6, 1945); *Garber* v. *United States,* 145 F. 2d 966 (C. C. A. 6, 1944); *Banning* v. *United States,* 130 F. 2d, 330, 339 (C. C. A. 6, 1942); *Simon* v. *United States,* 123 F. 2 80, 85 (C. C. A. 4, 1941) and cases there cited; *Morton* v. *United States,* 60 F. 2d 690, 699 (C. C. A. 7, 1932) cert. denied 288 U. S. 607 *Muller* v. *Territory of Oklahoma,* 149 F. 330, 335 (C. C. A. 8, 1906); Wigmore on Evidence (3rd ed. 1940) Sections 948-949, 963, 969, 1005, 1021-1022, 2062.

as petitioner who were interested in it, in a hostile or prejudiced manner. Petitioner was entitled to show that Drew, as a "rookie" detective had failed as an undercover agent in his first assignment in Harlem, and that when he found no "subversive" Congress on the East Side, he had exceeded his authority, created one, and become the head of it, in order to enlarge his reports and increase his personal standing with his superiors in the Police Department. Petitioner was entitled to show Drew's moral obliquity, misconduct, and improper activities bordering on entrapment (*cf. Cratty* v. *United States*, 163 F. 2d 844, 850-851 (App. D. C. 1947) and cases there cited) in promoting subversive activities which would not have existed and in soliciting members who would not have joined a subversive organization, but for Drew. Drew's double role, under a false name and fictitious identification as the head of a subversive organization which he had created, and as an undercover agent making nightly reports to the Police Department of subversive activities which he was promoting are circumstances which clearly show his overzeal, bias, interest and misconduct and which petitioner was entitled to probe fully and as a matter of right. The denial of this right, we submit, constitutes prejudicial error. "Common experience teaches us that the testimony of such witnesses (detectives), especially when uncorroborated, is open to the suspicion of bias . . . and that their cross-examination should not be curtailed primarily . . . especially when it has a bearing on the substantial issues of the cases."[42]

The proposed cross examination was not merely related to the discrediting of Drew as such, but had a direct bearing

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[42] *District of Columbia* v. *Clawans*, 300 U. S. 617, 630-631 (1937) and cases and authorities there cited.

cf. "I cannot adopt the contention that government spies are any more trustworthy, or less disposed to make trouble in order to profit therefrom, than are spies in private industry . . . Now that

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on the accuracy and motive of Drew's attribution of Communist Party membership to petitioner. If Drew's assignment to investigate a local branch of the Congress led him to create one where none existed, did it also lead him to report persons, such as petitioner, who attended its meetings or were active in its affairs as Communists, when in fact they were not? Such a line of inquiry is solidly grounded in another phase of Drew's testimony, as to which cross examination was permitted. Harper had testified unequivocally that he had ceased to be a member of the Communist Party in 1938 (R. 78) and Drew had testified on cross examination that in 1940 and 1941 Harper had engaged in no Communist Party activities with Drew which Drew recalled and that Drew did not know whether Harper was a member of the Communist Party in 1940 and 1941 (R. 127). On further cross examination, however, Drew admitted that he had made written reports to the Police Department in 1940 and 1941 that Harper was then a member of the Communist Party and had then engaged in Communist Party activities (R. 127-128, App. 61).

These reports were read to him and he verified them.[42] His testimony as to petitioner's membership and activities

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it appears that government spies constituted in December 1919 an active and efficient part of the Communist Party, it may well be that the Secretary of Labor will find it desirable, through his own forces, to institute some investigation of the nature and extent of the possible activity and influence of these spies in giving form and color to the documents on which the Secretary based his ruling in the *Preis* case.

As the evidence now stands, no important human rights should be determined on the basis of documents whose original and form are under such well grounded suspicion. (Anderson, Circuit Judge, in *Colyer* v. *Skeffington*, 265 F. 17, 69).

[42]Q. I will ask you whether or not on August the 24th, you made a statement written or oral. that the *comrades* at a party at

was based on these written reports from which he refreshed his recollection (R. 92, See Note R. 97). If his testimony was inaccurate as to Harper, was it also inaccurate as to petitioner? If he had reported Harper as a Communist Party member, engaging in Communist Party activities, in 1940 and 1941, when he admitted on the stand that he did not know that Harper was then such a member or had been engaged in such activities, did he also report petitioner as such a member, engaged in such activities, during the same period, when the basis of his testimony as to petitioner was the same written reports which he had made as to Harper? If Drew had any motive to contradict his written reports about Harper, a government witness,[44] did he have any motive which led him to testify as he did, about petitioner, in order to substantiate the same written reports?

If the proposed cross examinaton had been allowed to show the full extent of Drew's activities as an *agent provocateur* in the National Negro Congress, it might have provided the answer to these questions by showing Drew's motives: his bias in shading his testimony to assist the prosecution to protect Harper and convict petitioner; his interest in the outcome of the trial, which principally depended on the reliability of his undercover reports; and his misconduct in creating a "subversive" organization and

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Jean Madof's, 408 East 10th Street, included Bob Appel, Frances Sutton, *Louis Harper*, Elsie Harper, *all members of the C. P. 6th A. D.* A. Yes, sir (App. 61 italics supplied). Q. By the way, when you use the initials C. P., you mean the Communist Party? A. I do (R. 128). The Communist Party has several sections that are located throughout the city within Assembly Districts. They take the same numerical number of the Assembly District as is allotted by the City (R. 101). See also R. 127-128.

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[44]Harper in 1940-1941 was employed by the Federal government as a computer in Coast and Geodetic Survey (R. 73).

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soliciting members for it, in order to amplify his reports and obtain the favor of his superiors in the Police Department. Prejudice results from the denial of the opportunity for such cross examination, even though it cannot be shown that the examination would necessarily have brought out such discrediting facts. *Alford* v. *United States, supra.*

The court below held that these limitations upon the cross examination of Drew were not erroneous because "Full opportunity was given to explore the testimony given on direct. The limitations were upon the testing of credibility by inquiring into matters not included in direct examination" (R. 279). From the detailed analysis submitted above of Drew's testimony on direct examination and petitioner's offer of proof with respect to the subject matter of that examination, we submit that the court below is wrong. Full opportunity to explore that testimony with reference to Drew's role in the National Negro Congress was denied, except under a three-fold limitation which is unwarranted by applicable law and decisions. The limitations which were imposed restricted petitioner's right to cross examine Drew on credibility even with reference to his testimony on direct examination, as is shown by the trial court's refusal to permit the question as to whether Drew had testified that he was always out to help his people, and by the refusal to permit other questions, included in the offer, about Drew's activities in the National Negro Congress, about which he had testified on direct examination.

As to the proposed attack on Drew's credibility to show his bias, interest and misconduct as an *agent provocateur*, the court below held:

> "We do not find any undue restriction of cross examination on that subject. The witness was asked

and answered, without objection or restriction a series of questions upon it. He stated that he organized or helped to organize the East Side Council of the Congress, that the witness Harper helped him to organize it, and that he (the witness) solicited memberships in it. Full argument as to the witness's role was available to appellant on that testimony. The witness's activities were collateral to the issue in this case. Only to the extent that they constituted misconduct which had a tendency to show his lack of honesty or truthfulness could he be cross examined upon them, and the court having permitted sufficient inquiry to establish the basic facts in this respect, could in its discretion control the extent to which the matter could be pursued."[19]

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[19]*Pullman* v. *Hall*, 55 F. 2d 139, 141 (C. C. A. 4th, 1932) and authorities there cited; *Simon* v. *United States*, 123 F. 2d 80, 85 (C. C. A. 4th, 1941) and cases there cited. See *Ewing* v. *United States*, 77 U. S. App. D. C. 14, 135 F. 2d 633 (1942) *cert. denied* 318 U. S. 776, 87 L. ed. 1145, 63 S. Ct. 829 (1943)".

We submit that Drew's activities as an *agent provocateur* were not collateral to the issues in this case. These were the very activities, testified to by Drew on direct examination, which created the conditions relied on by the government to prove the falsity of petitioner's statements under all the counts of the indictment except the two relating to conscription. Thus, it was at meetings of the East Side branch of the Congress, that Drew introduced petitioner as a speaker, under the name of Tony Whales, a member of the Communist Party (R. 111); it was at another meeting of the same Congress that Drew testified that he was one of the principal speakers with petitioner, who was introduced as Tony Whales (R. 114-115), it was at another meeting sponsored by the same Congress, at

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which petitioner as reported by Drew, advocated that "now is the time for revoution" (R. 116); it was at other meetings between representatives of the Congress and of the Communist Party that Drew identified petitioner as having contributed services to or participated in the activities of the Communist Party as set forth in the indictment (R. 112, 115, 116-117). If Drew had not created the Congress, called these meetings (R. 115), and engaged in activities as the head of the local branch of the Congress, this evidence of petitioner's activities would not have existed. Under the applicable decision, the test of whether or not a matter is collateral is "whether it concerns 'a matter which you would be allowed on your part to prove in evidence,' . . . i.e. if the witness had said nothing on the subject. 3 Wigmore Section 1020", *Ewing* v. *United States,* 135 F. 2d 633, 641 (App. D. C. 1942) cert. denied 318 U. S. 776 and cases there cited. The mere fact that the matter is offered for impeachment does not make it collateral. Facts which have a direct bearing on the bias, interest, misconduct or other deficiencies of the witness and which are so related to the case that they could be admitted by extrinsic evidence as part of their proponent's own case are admissible as a matter of right on cross examination. See Wigmore on Evidence (3rd ed. 1940) Sections 944, 948, 963, 982, 1005, 1020-1022, 1810.

Here, if Drew had testified in his direct examination without ever having said a word about his employment as an undercover agent, his failure to find an existing branch of the Congress in Harlem or on the East Side, or his reports to the Police Department about the activities of petitioner in relation to the Congress, it would have been prejudicial error to exclude independent and otherwise admissible evidence of those facts, if offered by petitioner, to

show Drew's bias, interest and misconduct, as bearing on his lack of honesty and truthfulness. *Ewing* v. *United States, supra; Alford* v. *United States, supra; Morton* v. *United States, supra;* Wigmore ibid. That Drew did testify on these matters does not make them "collateral", nor does it defeat the right of petitioner to cross examine Drew fully as to those matters to show his deficiencies as a witness. Drew's credibility was as much an issue in this case as that of petitioner, since the government principally relied on his testimony to prove the falsity of petitioner's statements charged as false by the indictment (See Brief in Opposition to Petition, pp. 7-8).

Nor is this a case in which the trial court properly exercised its discretion in limiting the extent of cross examination. That examination had just begun and the questions which were propounded to Drew touched on only two matters—his organization of the local branch and his solicitation of members for it—of a lengthy series of questions, fairly included in the scope of the offer to prove, on which petitioner was entitled to cross examine. The trial court did not exercise its discretion after the subject had been exhausted, or to protect Drew from questions which went beyond the bounds of proper cross examination merely to harass, annoy or humiliate him. Here, as in the *Alford* and *Clawans* cases, it cut off in limine by improper restrictions all inquiry on which the defense was entitled to a reasonable cross examination. This was an abuse of discretion and prejudicial error. *Alford* v. *United States,* 282 U. S. 694 and cases there cited. *District of Columbia* v. *Clawans,* 300 U. S. 632.

And, even if such cross examination was within the discretion of the trial court, it was improper for the trial

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court to base the exercise of that discretion, as it plainly did here, on the supposed inability of the predominantly Negro jury to act as a representative jury in weighing the evidence sought to be adduced. For reasons already stated, the race or color of the members of a particular jury, properly chosen and otherwise qualified to hear and consider evidence, is a prohibited basis for withholding evidence from them, under the Fifth and Sixth Amendments to the Constitution.

Under these circumstances, it is immaterial that, as the court below suggests, "full argument as to the witness's role was available to appellant upon that testimony" (R. 280). Full argument is obviously not a substitute for the right of cross examination which was improperly curtailed.[45]

C. Limitation on the Cross Examination of Harper and Drew with Respect to the National Negro Congress.

The third series of rulings involved the refusal of the trial court to permit cross examination of both Harper and Drew as to the purposes, objects and organization of the National Negro Congress.

As noted above, Harper and Drew had testified for the government with respect to petitioner's activities in connection with a local branch of the National Negro Con-

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[45] Cf. the trial court's admonition to counsel for the petitioner, prior to his reserved opening statement, with obvious reference to the limitations imposed on the cross examination of Drew, which had just been concluded: "The Court . . . Mr. Ford, when you do make your opening statement, I ask you to be governed by the issues in this case, so that it won't be necessary for me to say anything . . . If you go beyond the issues, I will ask you to come up here . . . But I will do it so as not to make it appear I am cutting in on you." (App. 61). Cf. also, the court's interruption at App. 62-63.

gress, in support of Counts III (e) and (h) and IV (e) and (h) of the indictment. Captain Gallagher had earlier testified that the National Negro Congress was one of the "subversive" organizations which members of the undercover squad were assigned to investigate (R. 64, 65, 70). On the cross examination of Harper, petitioner sought to ascertain the purpose and objects of the National Negro Congress. Harper had replied by stating the reasons for the founding of the Congress, when, again without objection from the government, the trial court halted the examination, summoned counsel to the bench, and asked the purpose of the inquiry. Counsel for petitioner stated that since the government had brought out on its case that Harper had met petitioner at a meeting of the Congress, and that the Congress was concerned with problems of Negroes relating to housing, evictions and brutality, petitioner wished to show that petitioner was concerned with the Congress, because of its objects and not because of communism (R. 80-81). The necessary implication of counsel's reply was that the purpose of the proposed cross examination was to show that the Congress was not a subversive organization, that petitioner's activities in connection with the Congress were pursuant to legitimate, not subversive aims, and that proof of such activities was not proof that petitioner had contributed services to or participated in the activities of the Communist Party, as testified to by Harper and as charged in the indictment.

The trial court, however, stated "We are not concerned with this National Congress, sir . . . We will not go into this National Association for the Advancement of Colored People or the National Congress . . . we are not going into the organization and aims and desires of this Congress" (R. 81). Petitioner duly excepted to this ruling (R. 81).

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As also noted above, Drew was asked, on his cross examination, about his connections with the National Negro Congress. One of the grounds for pursuing the proposed line of cross examination, as stated by petitioner's counsel, was to develop under the heading of the National Negro Congress, all phases of the testimony of Drew, the basis for which was laid in his direct examination. The trial court's ruling, to which exception was taken, was that "I will not hear you on anything of that sort, save those meetings where he specifically attended, sir, and where Mr. Marzani was in attendance" (R. 124-125).

The court below found no error in the limitation imposed by the court below upon the extent to which this line of cross examination could be pursued, on the principal ground ground that "The subject matter was irrelevant to the issue in the case which was the truth or falsity of defendant's statement that he had never been a member of the Communist Party or been known as Tony Whales" (R. 280). But, Captain Gallagher had testified that the Congress was one of the subversive organizations which the Undercover squad was assigned to investigate. Drew and Harper had testified on their direct examination as to their own and petitioner's activities in connection with the affairs of that Congress. The indictment charged petitioner with having made false statements by denying such activities and services to the Communist Party as advising Party members to infiltrate groups for the purpose of creating Communist Front organizations and to sow discontent among Negroes by agitating the question of racial discrimination, to the end that members for the Party might be recruited (Counts III (e) and (h) and IV (e) and (h)). It was, therefore, relevant for petitioner to meet these charges in the indict-

ment and to rebut the testimony of Captain Gallagher, Harper and Drew, by showing that the Congress was not a subversive or Communist Front Organization, that his activities in connection with the Congress were not designed to sow resentment and discontent among Negroes for the purpose of recruiting Party members, but were pursuant to the legitimate and non-subversive aims of the Congress, about which Drew, as the head of a local branch, and Harper, as an informed and long-standing member of the Congress, were both qualified to testify. The testimony which was thus sought to be elicited was relevant to the issues in the case, related to testimony first brought out by the government in direct examination in its case, and should therefore have been permitted. The trial court's exclusion of the evidence, we submit, was prejudicial error.

D. The Failure to Treat the Predominantly Negro Jury in the Case as a Representative Jury.

The court below failed to find in any of these three series of rulings the basis which petitioner advances for them and held that the rulings would have been the same, regardless of the racial composition of the jury (R. 278-279). It pointed to the fact that petitioner "does not cite to us any specific place at which the court indicated such reasons for its ruling" (R. 278).

We submit that the reasons given by the trial court in his three extended colloquies at the bench fully warrant petitioner's contention (R. 186-189, 123-126, 79-81). In each instance, as soon as a question involving Negroes or the National Negro Congress was raised in such a way as to create, as the trial court apprehended, a danger that the predominantly Negro jury would be prejudiced in favor

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of petitioner, by his activities on behalf of Negroes (as in the incident involving police brutality against Negroes) or against the prosecution (as when petitioner attempted to show the misconduct of Drew, a Negro, in his activities as an *agent provocateur* in the local branch of the National Negro Congress, or that the Congress in which petitioner participated was not a subversive organization), the trial court on its own motion interrupted the examination and required a statement of its purpose, although such a statement is generally not required (*Alford* v. *United States, supra*). In each instance, the trial court limited the examination and prevented petitioner from adducing such evidence, even where it was admissible under the ordinary rules of evidence, as in the instance of his refusal to permit the proof offered with respect to Drew's activities as an *agent provocateur,* or the question as to whether Drew had stated that he was always out to help his people, because of its repeatedly expressed desire to avoid "sympathy" or "prejudice" in the case (R. 186-189). Although the record is replete with instances of the most inflammatory and prejudicial evidence offered by the government, much of it wholly irrelevant to the issues in the case, but not related to Negroes (R. 255, 108-109, 49-50, 231, 244-245, 248-249, 250-254, 218, 230, App. 64, 67, 71, 37-38, See pp. 59-61, *supra*) the trial court made no attempt to interrupt the questioning in these instances, and, if it did not overrule petitioner's objections, instructed the jury to disregard the testimony (R. 109). The clearest expression of the trial court's apprehension about the particular jury in the case came in the colloquy with respect to the direct examination of petitioner. There the trial court's statement that petitioner's testimony about the incident involving police bru-

tality against Negroes, which was directly in conflict with the testimony of Harper had the "other purpose" of prejudicing the jury and, in fact, did prejudice it, is clearly the rationale for his earlier rulings limiting Drew's cross examination and his refusal to go into "this National (Negro) Congress" although offered as to subject matter about which these witnesses had testified on direct.[46]

The trial court thus applied a unique standard for the admissibility of evidence, applicable only to this case and dependent upon the composition of the jury before it, rather than a universal standard, applicable to any respresentative jury. To the extent that the limitations which it imposed are not in accordance with the ordinary rules of evidence, those limitations are erroneous without regard to the motives of the trial court and cannot be justified, without violating constitutional guarantees, by the supposed peculiar susceptibility to prejudice of the predominantly Negro jury in the case. To the extent that the limitation of the testimony in question was subject to the trial court's discretion, the

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[46]The government has, at least inferentially, conceded that the trial court took into consideration in its rulings the predominantly Negro composition of the jury. In its brief in the court below, it stated "As respects the evidence under discussion, the court, in one sense, may have justifiably given a measure of consideration to the fact that there were Negroes on the jury. The merit in the government's objection that the evidence was collateral, self-serving and therefore prejudicial being obvious—it would have been no more than natural for the court to have considered how much greater that prejudice would be with Negroes on the jury, in view of the very nature of the evidence sought to be introduced by appellant concerning his activities 'on behalf of' that race" (Brief for Appellee, p. 65). As to this evidence, counsel for the government asserted "There can be no fair trial before *this* jury if you go into the beatings" (R. 188, italics supplied) and announced the government's intention to move for a mistrial if the testimony persisted (R. 189).

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race and color of this particular jury was an improper and constitutionally prohibited basis for the exercise of that discretion. "(The law) must not be a special rule for a particular person or a particular case", *Hurtado* v. *California,* 110 U. S. 516, 535 (1884). The Constitution does not sanction a distinction among jurors on the basis of race or color.

We submit that the trial court's failure to treat the predominantly Negro jury in this case as a representative jury constitutes a denial to petitioner of his rights under the Fifth and Sixth Amendments to the Constitution, which requires a reversal of the judgment below and is equally action contrary to the public policy of the United States, which this Court should correct in the exercise of its supervisory powers over the Courts of the District of Columbia. *Hurd* v. *Hodge,* 334 U. S. 24 (1948).[47]

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case dismissed, or, in the alternative, a new trial should be ordered.

Respectfully submitted,

OSMOND K. FRAENKEL,
ALLAN R. ROSENBERG,
Attorneys for Petitioner

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[47]See "To Secure These Rights" Report of the President's Committee on Civil Rights (1947), pp. 87-95.

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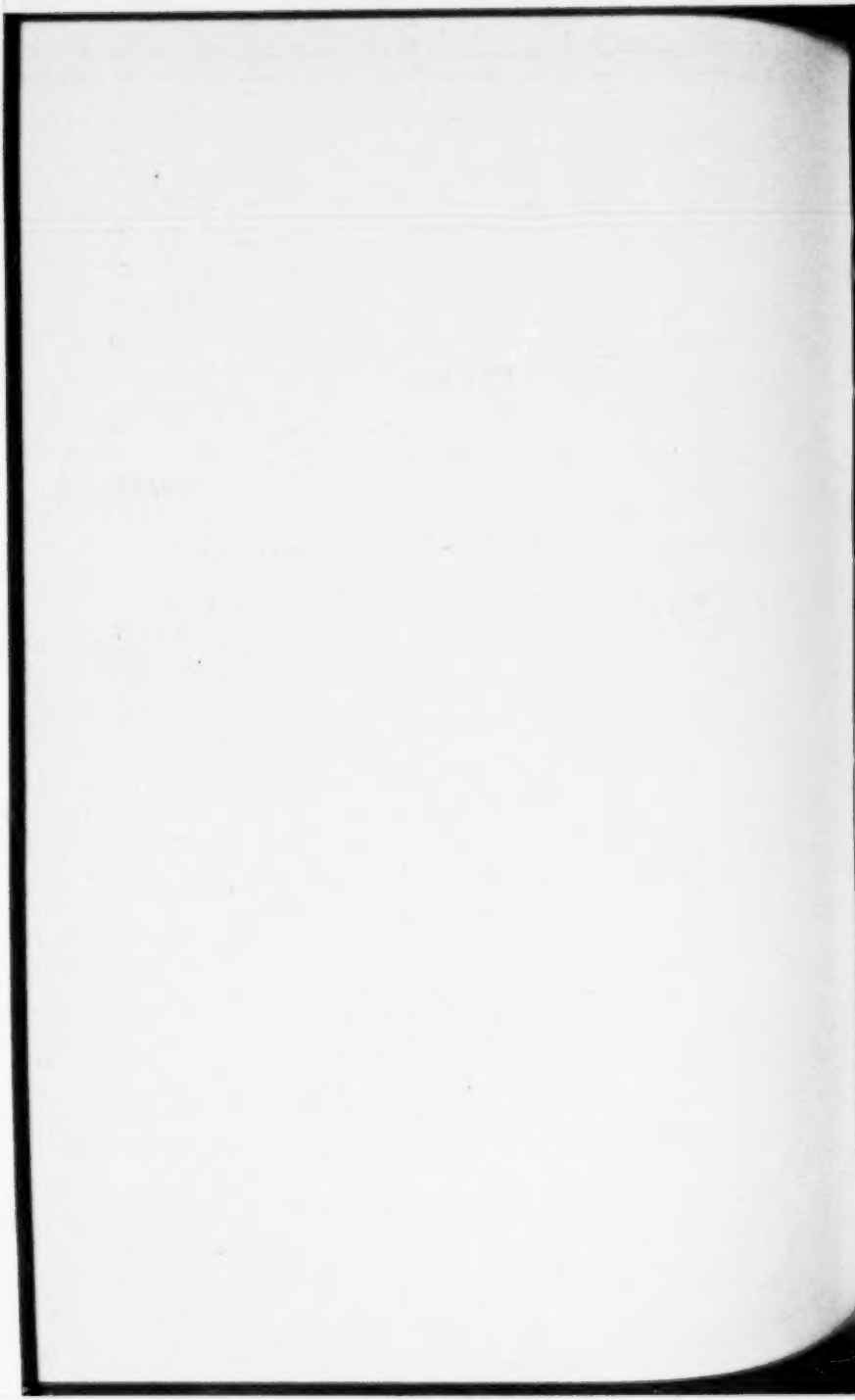

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A. Statutes

Criminal Code

Sec. 6. SEDITIOUS CONSPIRACY. If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder or delay the execution of any law of the United States, or by force to seize, take or possess any property of the United States, contrary to the authority thereof, they shall each be fined not more than $5,000 or imprisoned not more than six years, or both (U. S. C. Title 18, Sec. 6).

Alien Registration Act, 1940

Sec. 9. (A). It shall be unlawful for any person, with intent to interfere with, impair or influence the loyalty morale or discipline of the Military or Naval forces of the United States.

(1) To advise, counsel, urge or in any manner cause insubordination, disloyalty, mutiny or refusal of duty by any member of the Military or Naval forces of the United States . . .

Sec. 10. (A). It shall be unlawful for any person (1) to knowingly and wilfully advocate, abet, advise or teach the duty, necessity, desirability or propriety of overthrowing or destroying any government in the United States by force or violence or by the assassination of any officer of any such government . . . (U. S. C. Title 18, Secs. 9-10).

Judicial Code

Sec. 269 Amended . . . . On the hearing of any appeal, certiorari, unit of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after

an examination of the entire record before the court, without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties (U. S. C. Title 28, Sec. 391).

New York Anarchy Act

Sec. 160. CRIMINAL ANARCHY DEFINED. Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of the government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

Sec. 161. ADVOCACY OF CRIMINAL ANARCHY. Any person who:

(1) By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence or by assassination of the head or of any of the executive officials of government or by any unlawful means; or . . . .

(4) Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

Sec. 162. ASSEMBLAGES OF ANARCHISTS. Whenever two or more persons assemble for the purpose of advocating the doctrines of criminal anarchy, as defined in Section one hundred and sixty, such an assembly is unlawful and every person voluntarily participating therein by his presence, aid or instigation, is guilty of a felony (New York Penal Law, Sec. 160-162).

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B. Excerpts from Testimony Proceedings and Exhibits

Opening Statement on Behalf of United States

Mr. Kelley. May it please the Court and coun-
66 sel, and ladies and gentlemen of the jury:

The facts in this case are not at all complicated. The indictment consists of nine counts, or distinct and separate charges of a violation of the criminal statute.

There is however, a similarity between the vari-
67 ous charges composing the indictment in this sense:

each count relates to the same trial, and each count, therefore, charges that the defendant, namely, Mr. Marzani, made a false and fraudulent statement and representation to an agency of the United States Government——

The Court. May I interrupt you, Mr. Kelley?

Mr. Kelley. Yes, your Honor.

The Court. Did I understand you to say nine counts?

Mr. Ford. That is what he said.

Mr. Kelley. I meant to say nine counts dealing with the agency. There are a total of eleven counts; excuse me.

The Court. Very well.

Mr. Kelley. The last two counts relating to a false statement being made to an agent of the State Department.

The first four counts aver that the defendant made false and fraudulent statements to agents of the Federal Bureau of Investigation.

Counts 5, 6, and 7 charge that on a date to be named, the defendant made false and fraudulent statements to agents of the Civil Service Commission, and counts 8 and 9 likewise charge the making of false and fraudulent state-

ments to agents of the Civil Service Commission on a different date.

Then they come to the two last counts, which your Honor just reminded me of, relating to false statements made to the State Department.

The charge is made in three counts; one relating
68 to the Federal Bureau of Investigation, an offense charged as having taken place on the 29th day of July of 1942, that the defendant wilfully, knowingly and feloniously, falsely stated and represented to agents of the Federal Bureau of Investigation that he was not then and never had been a member of the Communist Party.

In count 6, the same alleged false statement is charged as having been uttered on the 22nd day of November of that year, 1942, made to agents of the Civil Service Commission, the same false statement and representation that he had never been and was not then a member of the Communist Party.

The same false statement is charged in another count of the indictment, count 10, that on or about June 1 of 1946, the defendant made the false statement and representation to the State Department that he had never been and was not then a member of the Communist Party.

Count 2 relates to the statement made to the F. B. I. to the effect that on July 29 of 1942 the defendant falsely stated and represented that he had never attended meetings of the Communist Party.

Count 3 similarly charges a false statement to the F. B. I. in that he is charged with on the 29th day of July, 1942, with having falsely stated and represented that he had never contributed any services to the Communist Party.

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Count 4 charges that to agents of the F. B. I. on
69 July 29, 1942, he made the false, fraudulent statement and representation that he had never participated in any of the activities of the Communist Party.

In counts 5, 8, and 11, he is charged respectively with having made false statements to the Civil Service Commission on the 23rd day of November, 1942, to the Civil Service Commission on the 20th day of April, 1943, and to the State Department on or about June 1, 1946; in each case last referred to, being charged with having falsely stated and represented that he had never used the name or been known as Tony Whales or by any similar name.

In counts 7 and 9 he is respectively charged with having falsely stated to agents of the Civil Service Commission on November 23, 1942, and on April 20, 1943, that he had never made any speeches against the conscription bill.

Now, it is my understanding that at the proper time this Court will charge you that the Government, as a matter of right, may inquire into the fitness and the suitability and the loyalty of employees of this Government or prospective employees——

Mr. Ford. (Interposing) May it please your Honor, I object, in his opening statement as to what his view of the law is.

We must wait until all the law as your Honor
70 will give it to the jury——

The Court. I think it will be well for you to make your statement on the facts, sir.

The Court will, as counsel has said, instruct the jury as to the law in the case.

Mr. Kelley. The Government must assume, because it has to assume and does here, the burden of establishing this defendant's guilt beyond a reasonable doubt.

We will undertake to do so by proving the following facts:

That this defendant applied for Government employment sometimes during the month of February of 1942;

That he received an appointment to a position in the Federal Government in an agency which was then known as the Coordinator of Information, frequently referred to as C. O. I.; that he received that appointment on the 7th day of March of 1942.

We will offer proof to establish that in a matter of a few weeks that agency, the Coordinator of Information, was by executive order created into what was called Office of Strategic Services, and that the defendant continued to be employed by that agency, O. S. S.

The evidence will establish his initial appointment on March 7 of 1942, and such later changes in his status as a Government employee, all conditioned upon his satisfactory loyalty test being conducted in connection with which
71 he would be found suitable on those grounds for continued employment.

The evidence will show that immediately following his employment by C. O. I., that agency requested the Federal Bureau of Investigation to undertake to investigate the history and background of this defendant to determine the matter of his loyalty, and that his employing agency, C. O. I., also at or about the time of his commencement of employment, requested the Civil Service Commission to conduct an investigation concerning his loyalty or lack thereof and that that agency did, in fact, undertake an investigation of that character.

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The Government's evidence will likewise establish that on July 29, 1942, the Federal Bureau of Investigation conducted through one of its agents, an interview with the defendant, during the course of which the defendant was placed under oath; that that interview was a part of and connected with its investigation of his loyalty.

The evidence to be offered by the Government will establish that at that time the defendant was asked whether he was then or ever had been a member of the Communist Party, and that he answered categorically "No";

That he was at the same time asked concerning whether or not he had ever attended meetings of the Communist Party, to which question categorically he replied "No."

72 During that interview with an agent of the F. B. I., still while under oath, he falsely stated in response to a question that he had never contributed any services to the Communist Party.

And we will further show that in response to a question by the agent of the F. B. I. as to whether or not he had participated at any time in the activities of the Communist Party, he answered categorically "No."

Further proof of the Government will establish that after he had been so interrogated by an agent of the F. B. I., a copy of his statement was furnished them and that later on —to be exact, on the 23rd of November of that year—he was interrogated by an agent of the Civil Service Commission here in Washington;

That at that time also he was placed under oath and he was asked by that agent of the Civil Service Commission whether or not he had ever used the name of Tony Whales, or been known by a similar name. Whereupon, he answered categorically "No."

That at that same hearing he was asked whether or not he had ever made speeches against conscription and that he answered categorically "No."

And similarly, that during the course of that interrogation on November 23, 1942, he was also asked whether or not he was then or had ever been a member of the Communist Party and again answered categorically "No."

Further, the Government's evidence will show
73 that following that hearing in November of 1942, and some time approximately late in December or early in January the following year of '43, the defendant and his employing agency, O. S. S., were notified by the Civil Service Commission that as a result of its investigation, it found the defendant Marzani unsuitable for Government employment and requested his dismissal.

The evidence will further show that immediately thereafter the defendant filed with the Commission a notice of appeal from that decision, requesting a hearing;

That the request was granted, and that on the 20th day of April, 1943, a hearing was had here in Washington before the Board of Appeals and Review, which is a part of the Civil Service Commission.

That during the course of that hearing, and while he was under oath, the Government will offer evidence to establish that he was asked by an agent or representative of the Civil Service Commission whether he had ever been known as Tony Whales, or had used a similar name, and that he responded in the negative, to the effect that he had not used the name Tony Whales.

The evidence will further show that during the course of that hearing before the Board of Appeals and Review, the defendant was asked whether or not he had ever made any speeches against conscription, and that he denied having

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done so, and that also at that hearing he was asked
74 whether or not he had ever been a member of the Communist Party, and that he answered "No."

Lastly, insofar as proof of the alleged false statements are concerned, the Government will offer a witness who will testify that on or about June 1, 1946, he interrogated the defendant in his official capacity as a representative of the State Department, and during the course of that interrogation, which was not under oath, the defendant stated to him that he was not and had never been a member of the Communist Party.

And that during the course of that interview with the witness who was an official of the State Department, the defendant was also asked whether or not he had ever used the name of Tony Whales or a similar name, and that he responded he had not.

Those, ladies and gentlemen, constitute a recital of the proof that the Government will introduce to establish what this defendant said at various periods to agents of the Government of the United States in connection with a matter in its jurisdiction.

The burden rests upon the Government, since it has alleged that those statements were false and fraudulent, to prove that fact.

The Government will undertake to introduce evidence at this trial to establish that every and every of those
75 representations were utterly false, and known to the defendant to be false at the time.

The Government's proof will establish that in 1940 this defendant held a position of branch organizer in the Communist Party, in the Sixth Assembly District of New York City, and later on that year, from 1940 until early

in '41, he became and held another office in the Communist Party in the Sixth Assembly District, known as Section Educational Director.

The Government will offer proof as charged in the indictment that the defendant attended as a member of the Communist Party many meetings of that Party.

It is alleged that all of the meetings that he attended—or it is charged in the indictment—were in the City of New York.

Moreover, in establishing the proof required under the charge that he had falsely denied participating in the activities of the Communist Party, the Government will offer proof that this defendant, Carl Aldo Marzani, delivered lectures to the Communists on the principles of Communism.

That the defendant issued and collected Communist Party membership books in his capacity as an official of the Party;

That this defendant Marzani composed, edited, published and distributed pamphlets in the interest and on behalf of the Communist Party;

That he further counseled and advised Com-
76 munist Party members and recruits with respect to methods and means to be employed in infiltrating divers groups in society for the purpose of creating Communist Party front organization.

The evidence will further establish that this defendant Carl Marzani urged Communist Party members to protest to their Congressmen against the passage of an anti-strike bill, and that he so urged them in his capacity as an officer of the Party.

The evidence will further establish that this defendant, during the course of Communist Party meetings and recruit

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meetings, instructed the members known in the Party as comrades to obtain recruits for the Communist Party, that is to say, drum up business.

The evidence will further show that this defendant counseled and instructed Communist Party members to sow resentment and discontent among Negroes, by agitating questions of racial discrimination to the end that members for the Communist Party might be recruited from the ranks of Negroes.

The evidence to be offered by the Government will further show that this defendant urged Communist Party members to attend study classes to the end that they might improve their knowledge of the doctrines and the methods of the Communist Party.

We will further establish that the defendant did
77 distribute among Communist Party members tickets to a showing of the Soviet film entitled "Great Beginning." And that in his capacity as Branch Organizer of Branch F-2, the Sixth Assembly District of New York, this defendant did counsel and instruct divers party members concerning a plan, policy and program of that Communist Party, such plan and program having for its purpose, one, disintegration of the morale of the military forces of the United States; second, that he did urge members of the party to teach the principles of Communism to men in the military forces with whom they would come in contact, and that he did urge the recruiting of members for the Communist Party from the ranks of the military forces of this country to the end that the Communist Party might gain control thereof and thus bring about a revolt against the Capitalist system.

The Government will offer proof that during 1940 and 1941 up to approximately the 22nd day of June of 1941, this defendant consciously was known as and consciously used and employed an alias "Tony Whales".

Previous to that time, dated from August of 1939, a peace pact existed between the Soviet Union and Germany. As you know, the attack on the 22nd of June was swift and unadvanced by notice.

Mr. Ford (interposing). May it please your
78 Honor, does he offer now that he is going to show these things as facts?

Mr. Kelley. Yes. The Court will take judicial notice of that.

Mr. Ford. "Swift" and "sudden"?

I have no objection to that if he proves the fact that it was swift and sudden.

Mr. Kelley. Yes. The Government will further establish that up to the 22nd day of June, 1941, the date of the attack by Germany on Russia, this defendant actively advocated in his capacity as branch leader or organizer and subsequently in his capacity as Section Educational Director, the Party line, insofar as it was to be implemented by his associates and comrades in his branch and those with whom he worked in an official capacity, to the extent or urging upon them and appointing committees from among the Communist Party members in his branch to picket certain Congressmen, advocating that that Congressman vote against conscription.

Also to picket Congressmen advocating that Congress vote against lend-lease, and vote against repeal of the neutrality act.

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It will further show that this defendant in his capacity of a leader within the Party would advocate and recommend the fomenting of strikes in industries and plants which were then or who might contemplate production of materials for war. And the evidence will show that within
79 a matter of a few days or two weeks, roughly, this defendant ceased advocating such measures to members of the Party and himself became connected with an organization known as Defend America and Smash Hitler, and that immediately from the public rostrum, from street corners, meetings and rallies, he advocated consistently that we do get into the war; that we do give lend-lease aid; that the program for selective service be implemented and cooperated with; all-out aid should be given to Churchill and to Stalin, and full cooperation with the leadership in this country.

The evidence will show that that transition was abrupt and clean-cut.

It will not be my purpose to undertake in this summary that I have given of the evidence of falsity that the Government intends to introduce to cover every item that may be offered in evidence, but I feel that I have covered the major portions of it.

And I give my assurance to this jury that it is the purpose of the Government to prove this defendant guilty only by such evidence and beyond a reasonable doubt.

I thank you.

Mr. Ford. Would your Honor care to make that statement to the jury now?

The Court. Yes. You will reserve your opening statement at this time?

Mr. Ford. Yes, sir.

80 The Court. Ladies and gentlemen of the jury, the Government has made its opening statement, as is its right.

The defendant likewise has a right to make its opening statement at this juncture or at a later juncture.

Counsel for the defendant has indicated to the Court he prefers to make his opening statement later.

I will state to you now, however, that the statement made by the Government counsel or statement to be made by defendant's counsel is not evidence in this case. It is merely what they expect to show you by way of evidence from the witness stand.

That is true as to the Government. That will be true as to the defendant when his counsel makes his opening statement.

You may proceed with your evidence now, Mr. Kelley.

* * * * *

The Court. I then understand that you are offering No. 4 and it may be received. 91

(Thereupon, Government's Exhibit No. 4 for identification, was received in evidence.)

Mr. Kelley. We are offering them on the basis of their certification, your Honor.

Mr. Ford. As to Government's Exhibit marked No. 5, your Honor, there are three pages, and we have no objection.

The Court. It will be received in evidence.

(Thereupon, Government's Exhibit No. 5 for identification, was received in evidence.)

Mr. Ford. We have no objection, may it please your Honor, to Government's Exhibit No. 6.

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The Court. It will be received.

(Thereupon, Government's Exhibit No. 6 for identification, was received in evidence.)

Mr. Ford. The same applies to Government's Exhibit No. 7.

The Court. No. 7 will be received.

(Thereupon, Government's Exhibit No. 7 for identification, was received in evidence.)

Mr. Ford. As to No. 8, the same thing, your Honor.

The Court. No. 8 will be received.

(Thereupon, Government's Exhibit No. 3 for identification, was received in evidence.)

Mr. Ford. The same as to Government's No. 9.

The Court. No. 9 will be received.

(Thereupon, Government's Exhibit No. 9 for identification, was received in evidence.)

Mr. Ford. The same as to No. 10.

The Court. 10 will be received.

(Thereupon, Government's Exhibit No. 10 for identification, was received in evidence.)

Mr. Ford. The same as to 11.

The Court. No. 11 will be received.

(Thereupon, Government's Exhibit No. 11 for identification, was received in evidence.)

Mr. Ford. The same as to 12.

The Court. No. 12 will be received.

(Thereupon, Government's Exhibit No. 12 for identification, was received in evidence.)

93

Mr. Ford. May I ask him whether there is a question in item No. 13 as to whether he is in the capacity of the office?

The Court. Something he knows as custodian of those records?

Mr. Ford. Yes, sir.

The Court. Do you want to tell Mr. Kelley what you are going to ask?

Mr. Ford. Yes.

(Counsel conferred with each other.)

By Mr. Ford:

Q. On Government's Exhibit No. 13, in writing at the bottom thereon appears this language:

"He is detailed back to OSS and is retaining his badge and other identification. 11/1/43."

Mr. Kelley (interposing). Is that "retaining" or returning"?

Mr. Ford. "Retaining."

That is November 1, '43.

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By Mr. Ford:

Q. On the writing here "He is detailed back" that means he is ordered back to the State Department to that same position; right?

A. At that time he was an employee of the Office of Strategic Services.

Q. I understand that. Then he went in the
94 Army and after he was in the Army he was detailed back to take the same job that he had when he gave it up to go into the Army; right?

A. That is right.

Mr. Ford. That is what I meant, to clarify that language, your Honor.

Mr. Kelley. We can stipulate that that is its meaning, Mr. Ford.

Mr. Ford. All right.

No objection to No. 13, then.

The Court. 13 is received.

(Thereupon, Government's Exhibit No. 13 for identification, was received in evidence.)

Mr. Ford. May it please your Honor, the following language appears on Government's Exhibit No. 14, which is dated September 26, 1943, and under "Remarks or proposed duties" this language appears:

> "Mr. Marzani is being released from the Army on 17 September. It is desired to return him to his civilian status with this Branch."

It is agreed, I understand, between Government counsel and myself that that means when Mr. Marzani got out of the Army, the personnel section of the State Department

desired his return to that same job, to come back to it. Is that correct?

Mr. Kelley. Yes.

The Court. With that stipulation, it will be received in the record.

Mr. Ford. All right. That is No. 14, if your Honor please.

The Court. Yes, sir.

(Thereupon, Government's Exhibit No. 14 for identification, was received in evidence.)

Mr. Ford. Government's 15, your Honor, consisting of six pages, we have no objection to it.

The Court. It will be received.

(Thereupon, Government's Exhibit No. 15 for identification, was received in evidence.)

Mr. Ford. The same as to Government's 16.

The Court. It will be received.

(Thereupon, Government's Exhibit No. 16 for identification, was received in evidence.)

Mr. Ford. As to Government's No. 17, I do not question its accuracy, but I do not concede its relevancy or competency to any charge in this case.

Would your Honor care to look at it?

(The exhibit was handed to the Court.)

Mr. Kelley. If your Honor please, I say that it becomes relevant and material because of a matter of law——

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The Court. Suppose we don't discuss it at this time. I will receive it, subject to your motion to strike if he fails to show its materiality or relevancy.

(Thereupon, Government's Exhibit No.
96 17 for identification, was received in evidence.)

* * * * *

The Court. Your are at liberty to read them, sir.
103 Mr. Kelley. I desire to read portions only of the exhibits which were received in evidence, and I now refer to Government's Exhibit 4, which is dated February 10, 1942, with the heading "Coordinator of Information" and is entitled, "Application and personal history statement," on the last sheet of which appears a signature purporting to be that of Carl A. Marzani.

And having reference to Government's Exhibit 5, composed of two photostatic copies of telegrams, each of them dated March 4, 1942; the first addressed to Carl A. Marzani at 643 East 6th Street, New York. It is from James B. Opsata, Chief of Personnel Division, Coordinator of Information.

It reads:

"Your appointment as economic editor P-4 $3,800
104 per annum. Economics Division, Office of Coordinator of Information approved urgent you report as soon as possible. Wire collect date you expect to arrive Washington, D. C. Report to room 113 Apex Building, 7th and Pennsylvania Avenue."

The remaining telegram in this exhibit is addressed to Mr. Opsata, signed by Carl A. Marzani, and reads:

"Appointment accepted as economic editor P-4 $3,800 per annum. Reporting for work Friday 6th."

Referring to Government's Exhibit 6, it is a photostatic copy of a letter from Mr. James P. Opsata, Chief of Personnel Division, addressed to the United States Civil Service Commission, under date of March 4, 1942:

"Gentlemen:

"In accordance with the provisions of Executive Order No. 8564, authority is requested for the appointment of Mr. Carl A. Marzani to the position of economic editor, P-4, $3,800 per annum, in the Economics Division, Office of the Coordinator of Information."

Referring to Government's Exhibit 7, it is a letter from L. A. Moyer, Executive Director and Chief Examiner, on the letterhead of the United States Civil Service
105 Commission, under date of March 6, 1942, addressed to the Coordinator of Information:

"Sir:

"As requested on March 4, 1942, the appointment of Mr. Carl A. Marzani (date of birth, March 4, 1912) as economic editor, P. 4, $3,800 per annum, Office of the Coordinator of Information, is approved, under Executive Order No. 8564 of October 8, 1940, for the duration of the national defense program, subject to character investigation."

Reading from Government's Exhibit 8, a document signed by James B. Opsata, on the letterhead of the Coordinator of Information. Its date is March 7, 1942, and it bears the name of "Carl A. Marzani" and the language "nature of action: indefinite appointment."

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"Effective date: March 7, 1942."

To the position of "economic editor."

Under the title "Remarks" appears the following language:

> "This appointment is subject to a favorable report of the character investigation being made by the United States Civil Service Commission."

With reference to Government's Exhibit No. 9, entitled, "Personnel affidavit," it recites:

> "Coordinator of Information, Research and Analysis, Economics, Washington, D. C."
>
> "Carl A. Marzani."

Followed by a printed oath, and there appear in two places to be a signature purporting to be that of Carl A. Marzani, and it has been notarized before a notary public.

Referring to Government's Exhibit 10, headed, "Coordinator of Information," dated June 30, 1942, signed by James B. Opsata, addressed to Carl A. Marzani, entitled,

> "Nature of action: Change in status.
> "Effective date: June 30, 1942."

It recites his transfer in status from economic editor at $3,800 per annum to the position of senior economic editor, P-5, at $4,600 per annum, and under "Remarks" recites:

> "This appointment is subject to a favorable report on the character investigation being made by the United States Civil Service Commission."

Referring to Government's Exhibit 11, a similar document to the last one read, save for the fact that the words "Coordinator of Information" at the top have been stricken

out in typewriting and there has been inserted "Office of Strategic Services."

It is likewise signed by James B. Opsata, under date of November 21, 1942, addressed to Carl A. Marzani, entitled:

> "Nature of action: Change in status and transfer within OSS."

107 "Effective date: November 21, 1942."

And it recites the change in status from the position of senior economic editor at $4,600 to the position of chief, editorial section, at $5,600 per annum, P-6.

Referring now to Government's Exhibit 12, identical in the heading of the last one read—OSS—addressed to Carl A. Marzani, dated August 2, 1943.

> "Nature of action: Change in status.
> "Effective date: August 2, 1943."

It recites a transfer in status from chief, editorial section, to the position of assistant chief, salary to remain constant at $5,600 a year.

It likewise bears the notation under "Remarks":

> "Subject to a favorable report of the character investigation being made by the United States Civil Service Commission."

Having reference to Government's Exhibit 13, headed "Office of Strategic Services," purportedly signed by Carl A. Marzani, entitled, "Tender of resignation from the position of assistant chief, presentation division, $5,600, for the reason: Military service."

And there is noted, as counsel for the defendant brought out in examining the last witness, in pen, there appears to be

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written on this exhibit, "He is detailed back to OSS and is retaining his badge and other identification."

Having reference to Government's Exhibit 14,
108 it is a document headed "OSS personnel action request."

The name of Carl A. Marzani appears thereon, "War service appointment," and it relates to the position of deputy chief, presentation branch, CAF-14, at a salary of $7,175; under effective date, it says:

"September 20, 1945, as soon as possible."

Under "Remarks" is the following:

"Mr. Marzani is being released from the Army on 17 September. It is desired to return him to his civilian status with this branch."

It is dated September 13, 1945, and bears the signature of M. L. Brockdorff.

Government's Exhibit 15 is on a Civil Service form, No. 332, entitled, "Application for federal employment."

The date of the application is September 27, 1945, purportedly signed by Carl A. Marzani.

Government's Exhibit 16, entitled "Office of Strategic Services," dated September 20, 1945, addressed to Carl A. Marzani.

"Nature of action: War service appointment.
"Effective date: 20 September, 1945."

It announces his appointment to the Office of Deputy Chief, Presentation Branch, CAF-14, at $7,175 per annum.

And Government's Exhibit 17, entitled "Oath of office, affidavit, and declaration of appointee," purportedly signed
109 by Carl A. Marzani on the 4th day of October, 1945, before Virgyl E. Hall—OSS, on October 4.

* * * * *

Q. Mrs. Newman, I show you what has been
154 marked for identification Government's Exhibit 22 and it is noted that it consists of fifteen pages.

* * * * *

Mr. Kelley. We offer the exhibit in evidence, your Honor. I believe that Court and counsel have copies.

Mr. Ford. Yes. But I would like to ask a preliminary question.

Mr. Kelley. Surely.

155 By Mr. Ford:

Q. In addition to the fifteen pages, which is what you typed up from your notes, don't you have attached to it an exhibit?

A. There is attached some handwritten notes.

Q. Yes, and I am talking about an exhibit, known as Exhibit A.

A. Yes, in the front.

Mr. Ford. Your Honor, it is agreed that through oversight Mr. Kelley overlooked the exhibit.

There is no particular significance to having not brought it out.

Mr. Kelley. May the witness be temporarily excused until we can call one who can identify that portion, and I will have her back on the stand after that.

Mr. Ford. I just want to identify what is in there.

Mr. Kelley. All right.

By Mr. Ford:

Q. So to get it clear, the hearing which you took down stenographically and then reduced the notes, comprise these fifteen pages?

A. That is right.

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Q. Then on top of this, as you will note, is Exhibit A, which is a photostat of an instrument. That also is a part of the hearing; correct?

A. I can't say for sure.

156 Q. Well, now, for instance, isn't the testimony here which you transcribed, while they were putting the questions to Mr. Marzani and he was answering, wasn't this referred to and handed to him, and wasn't he asked to look at it, and he identified it?

A. Yes, it was.

Q. I mean, that is it; one that was used. Correct, to the best of your knowledge? Is that right?

A. That is right.

Q. Then in addition to those instruments on the back, there is another exhibit which is in handwriting, consisting of five pages; right?

A. Yes.

Q. That also was part of the hearing that Mr. Marzani was in; correct?

A. As I recall, this is in addition to the testimony Mr. Marzani made after we gave him the trial; when he was given these typewritten pages to proofread and sign that they were correct, he made these corrections.

Q. That is right. So that these four sheets represent corrections made by Mr. Marzani after it was handed to him to see if he had any corrections to me. He said "Yes," and these are the corrections he wrote down; correct?

A. That is right.

157 Mr. Ford. I have no objection to the offer.

It may be received in evidence.

The Court. All right.

(Government's Exhibit 22 for identification was received in evidence.)

* * * * *

158 So I offer 22 and 25 in evidence; all being part of the one transaction.

Mr. Ford. So the photostat is No. 25; right?

Mr. Kelley. Correct.

The Court. Will you gentlemen come to the bench a minute?

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

Mr. Ford. Of course, we reserve as to competence and relevancy, as we agreed before, in exhibits, which is part of the motion which I am not repeating at this time.

* * * * *

160 Mr. Kelley. Exhibit 25 being the photostat, I will, with the Court's permission, pass among the jury for their perusal.

I am reading now from Exhibit 22, consisting of fifteen pages:

"Report of special hearing

Carl Aldo Marzani, c/o Mr. Hugh C. Barton, Route #3, Vienna, Virginia.
Applicant for the position of Economic Editor, Office of Coordinator of Information (Investigation at their request), E. O. 8564.

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Special hearing conducted November 23, 1942, in room 517 Mather Building.

Special hearing conducted by Charles N. Keating, Sr. Investigator.

Witnessed by: John H. Finlator, Jr. Investigator.

Stenographer: Selma S. Newman.

Mr. Keating: In the course of investigation as to your character and qualifications for the position of Economic Editor, a number of matters were revealed which were either discrepant, or misleading or which might reflect on your character, loyalty or
161 qualifications for employment in this position.

It is an established policy of the United States Civil Service Commission that these matters be brought to your attention, affording you opportunity to present such answers or explanations you wish to make. Such answers or explanations will be included as a part of the report made on your case so that the Commission will have them for consideration in arriving at a decision.

I should like to present these matters to you at this time. It is the practice of the Commission to receive your statement or explanation under oath. Do you have any objection to taking an oath?

A. No.

(Whereupon

CARL ALDO MARZANI

was duly sworn and stated as follows:)

Q. What is your full name and present address?
A. Carl Aldo Marzani, Vienna, Virginia.
Q. What is your address in Vienna?
A. It is rural delivery, that is the address.
Q. With whom do you live there?
A. Myself and my wife.
Q. When and where were you born?
A. Born in Rome, Italy, March 4, 1912.

162 Q. When did you come to this country?

A. 1924, September first or second, something like that. Labor day, the day before Labor day.

Q. How was your citizenship derived?

A. Through my father.

Q. Have you ever used any other name?

A. No.

Q. What is the maiden name of your wife?

A. She has had a couple, Eisner is her maiden name at birth, she was on the stage and used the name of Emerson.

Q. What is her full stage name?

A. Edith Emerson.

Q. Were her parents named Eisner?

A. Yes.

Q. What are their names?

A. Stanley Eisner and Babette Eisner.

Q. Where do they live?

A. 403 Center Street, South Orange, New Jersey.

Q. What is Mr. Eisner's occupation?

A. Manufacturer.

Q. Is your wife employed?

A. No.

Q. What is your present position?

A. I am Chief of the Editorial Section of the Presentation Division of the Research and Analysis
163 Branch of the Office of Strategic Services.

Q. Who is your supervisor there?

A. Mr. H. C. Barton, Jr.

Q. Had you known Mr. Barton prior to your employment at the Office of Coordinator——

A. (Interposing) No.

Q. Who are some of the people here in Washington who would know you real well, social acquaintances who would know of your character and reputation?

A. Prof. Paul Studenski, I believe he is at OPA.

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Q. How long have you known him and what has been the nature of your association?

A. I have known him for the last three years, he was my—I worked very closely with him at New York University where I was working before I came down. As I think over, probably no one in Washington who would know me over a year, people who would know me would be at my old college, Williams College. I don't believe there is anyone in Washington, Dr. Baxter, who is head of the University, but I believe he has gone back to Williams College, he is president of Williams College.

Q. Who knows you well in New York City?

A. Primarily, people at the university.

Q. Would you care to name some of them?

A. Dr. Walter Sparr, he is head of the Eco-
164 nomics Division, Dr. Muntz, Dr. Nathan, I believe he is at Vassar now, Otto Nathan, he was in Washington from time to time, as a matter of fact, probably at OPA.

Q. Are these social acquaintances and professor associates?

A. Yes, people who are—who have seen a great deal of me.

Q. What trips abroad have you made since entering the country?

A. Well, I only went out of the country twice, no once, I spent a week in Canada, but hitchhiked so there is probably no record, I also hitchhiked to Mexico, I had to sign immigration blank though.

Q. When was that?

A. When the Morro Castle burned, 1934. Then I left this country late 1936, I think it was September or late August, around there, and then I was out of the country entirely until early 1939. That was about three years in which I spent most of it in England, I was studying at Oxford, I was at Ox-

ford, after I left Oxford I went around the world, India, China, Japan, and came back to San Francisco in May 1939.

Q. What countries in Europe did you visit other than England?

A. Well, all of them except Italy, Russia and
165 Finland and the Baltic States and Poland. In other words, I was in every country except the extreme northeastern section. I think that is about right. Bulgaria, I guess I missed and Greece, I think that is about all.

Q. What were you doing in those countries?

A. When?

Q. After you left England.

A. Just going through.

Q. What——

A. (Interposing) Motive? Just to look at them.

Q. What——

A. (Interposing) Means? Hitch-hiked mostly. I spent $550 for myself and my wife for the whole trip.

Q. Do I understand that you did some writing while in Europe?

A. Yes, I did. I wrote as I recall, two articles for Ken magazine, I wrote one article for the London Spectator.

Q. Were those articles written under your own name?

A. Yes.

Q. What was the title of the articles written in Ken?

A. I don't remember the titles, one was on Germany, travel, the other was on certain documents captured in Spain, Italian, which were released, I forget who it was, Spanish Ministry of Information, I translated those documents. For the London
166 Spectator I wrote an article on Barcelona in late 1936.

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Q. Were you in Spain during the civil war?

A. I was.

Q. In what capacity?

A. Observer, writer, just on my own.

Q. Were you writing for any particular paper?

A. No.

Q. Did the magazine Ken furnish any funds to you?

A. No. Anything I wrote was as a consequence of having gone, rather than of having made prior commitments.

Q. Did you participate in any way in the events taking place in Spain at that time?

A. No, except being there. I was with the anarchists in North Arragon, spent considerable time, several weeks with them, you know—sat around and talked.

Q. Are you speaking of the anarchists or the loyalists?

A. The anarchists were a part of the loyalists.

Q. Who sponsored your trip to Spain?

A. Nobody.

Q. Were you traveling under the American State Department passport?

A. That is right. I don't think there will be any record of it. In that time there was no special record. I have my passport, it is visaed, you can see that.

167 Q. By whom in Spain?

A. I don't know. I have no recollection, it is on the thing. Soon after I came back, about two months, the State Department stamped all passports, not valid for travel in Spain, that was before that. That is why there is no special record.

Q. Were you ever employed by the London Daily Herald?

A. No, we had an arrangement, they wrote a letter for me to the effect that they would hire me

if I could go down, that was later, about a year, year and a half, they would have given me a job and I tried to get a visa from the State Department, this was considerable later, I had wires from Paris to the State Department and they turned it down. All they would do is tell me they had a letter for me to the Consul to the effect that they would use material which I would write if I could get a visa, they would not get the visa for me, it was contingent.

Q. How much time did you spend in Spain altogether?

A. About two months, I should think, probably less.

Q. Can you give me the dates that you wrote for Ken Magazine?

A. Close enough so you can find them. It was in 1937, probably, it was number two issue of Ken, the other one was a little later. The Spectator was
168 about, I don't know the same time, roughly, for six months in 1937, somewhere in there.

Q. Now, who made contact for you with the loyalists in Spain?

A. Nobody. It was very simple, I went up and said I wanted to go and that is all there was to it. Remember this, it is the early days, they were more than happy to have anybody go down and look at it. They wanted as many people as possible to see what was going on.

Q. Were you in the Spanish Loyalist Army?

A. No.

Q. The Commission has received information to the effect that you were affiliated with the Abraham Lincoln Brigade. Is that true?

A. It isn't true.

Q. Were you affiliated with the American organization known as the Friends of the Abraham Lincoln Brigade?

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A. No. I suppose you realize that just being in Spain would naturally give rise to a lot of information.

Q. Do you know Edwin Rolfe?

A. No.

Q. What boat did you leave New York on?

A. I think it was the American Banker, American President, it was American something, you can find that very easily.

169 Q. Did that take you direct——

A. (Interposing) To London.

Q. After you returned to this country where did you then take up residence?

A. Well, I stayed with my wife's family for quite a while, about four or five months, then I went on relief and I lived at 643 6th Street and I resided there until I left for Washington.

Q. Approximately how long were you on relief?

A. About two or three weeks, very short time, I got a job on WPA in New York University.

Q. The Commission has received information to the effect at the time that you and your wife applied for relief you both stated to the Department of Welfare of New York City, that your wife's mother died in childbirth at Joplin, Missouri, and that subsequently thereto in 1936 her father died and gave that as a reason for seeking relief, that is, that you were unable to obtain help from anyone in your immediate family. What comment would you have to make on that?

A. None.

Q. Is the information correct?

A. Could be. I wouldn't want to say yes, I mean, you know, it is possible that it was said. You
170 must remember it was a long time ago.

Q. Do you know whether or not that was said?

A. No, I am not trying to be facetious, probably some such thing was said, I honestly don't remember.

Q. Then it is quite possible too that that information was given out by you?

A. Possible, it is also possible it may have been given by my wife. I remember something was said for us to get on relief, whether I said it or my wife said it.

Q. Do you recall the case workers coming back to your home and making further inquiry concerning your wife's parents?

A. No, I don't recall.

Q. Who were you living with at that address?

A. My wife.

Q. Anyone else?

A. No, from time to time various friends stayed with us.

Q. Do you know Ruth Gikow?

A. Yes.

Q. Didn't she live at that address with you?

A. No, I don't think so. She stayed a few days I imagine, but I can't recall just when or where.

Q. Wasn't the lease in her name?

171 A. No.

Q. Whose name was the lease in?

A. Mine.

Q. What did Ruth Gikow do?

A. What do you mean?

Q. Her occupation.

A. An Artist. I think she was on WPA. I am not sure just when, we saw her very seldom, she was someone we had met and saw from time to time, three or four months.

Q. Do you know Reva Helfond?

A. No. At least I don't recollect the name right now.

Q. Didn't she live at that address part of the time too?

A. I don't think so.

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Q. Do you recall her working for the WPA?

A. I just don't recall the name, I know a lot of people on WPA, artists, she may have been one of them.

Q. When you gave the Welfare Department of the City of New York your past residence why did you fail to give the address of your father and mother-in-law in East Orange, New Jersey?

A. Well, the answer to that is simply we would not have gotten on relief, well, I mean, the situation
172 was impossible, I don't go—you know—my relationship with my in-laws is not such that I could live in their home.

Q. In other words, is it your opinion that had you given the Welfare Department the true facts concerning your father and mother-in-law and their address in East Orange, New Jersey, that you would not have obtained relief?

A. I don't know, frankly. I think if my wife had been on relief alone, probably not, in my case we couldn't take the chance. I don't know to what extent my in-laws are legally entitled to take care of me. They are probably responsible for my wife."

May I interrupt. It is indicated that that answer was correct; right?

Mr. Ford. I have a little "y" here opposite the answer.

Mr. Kelley. On page 8 of the added sheet the "y" is there. Did you find it?

Mr. Ford. Yes.

Mr. Kelley. Read it.

Mr. Ford (reading):

"I certainly would have"——

And then a word is written and a line through it.

—"obtained relief for myself personally and that is the important fact, since only through being on relief could I get a job on WPA. It is a fact
173 that I was entitled to and would have received relief. On the other hand, my wife alone would probably not have received relief. Both applying together, I don't know what the outcome would have been. Probably yes, since I am legally responsible for my wife and not her parents. I don't know to what extent my in-laws are legally responsible for me."

Now we will go back to the testimony.

Mr. Kelley. Page 8.

Mr. Ford. I have it.

Mr. Kelley. We overlooked an earlier correction, if we could go back to page 7, I will repeat the question.

If you will repeat the answer, then we will go to the correction.

Mr. Ford. I have it.

Mr. Kelley. Going back and repeating the question on page 7:

"Q. Then it is quite possible too that that information was given out by you?

A. Possible, it is also possible it may have been given by my wife. I remember something was said for us to get on relief, whether I said it or my wife said it."

Now we will go back to the correction. Now, reading the correction, which appears in handwriting:

174 "Possible, but not likely. In all probability it was given by my wife."

Now going back to page 8 and picking up with the testimony:

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Referring, I think you will agree with me, to the defendant's wife's parents, the question was:

"Q. But you had lived with them five months prior to going on relief.

A. That is exactly the point. You can stay with them for a certain length of time but you can't stay there indefinitely.

Q. Did you feel that justifies one in making false statements concerning their existence?

A. Well, I mean—I am just not prepared to argue the ethical problem involved, that is all.

Q. The Commission has also received information to the effect that you advised the Welfare Department of the City of New York that you had no bank account but that as a matter of fact you did at the time have some money in an English bank.

A. Oh, that is not true. I had an open account in an English bank, maybe $5 in it. As an actual fact, I kept an open bank account because there were various odds and ends which were owed me, $5 here and there, secondly as I traveled around I had travelers checks from the bank, there may have been
175 $15 or $20. There is no question it is peanuts in the way of living. As far as I know I owe the bank money, I owe them a couple of dollars. I have had no dealings with the bank since I left England."

And that suggests a correction, I think. And I have it handy here for you.

Mr. Ford. Continuing that answer by way of correction:

"I may owe the bank money, perhaps a couple of dollars of carrying charges."

Mr. Kelley. Referring back now to the top of page 9:

"Q. Was your wife also employed by WPA in New York?

A. I think for a very brief period, she was when I was ill, it was a common practice to allow substitution.

Q. What were the circumstances surrounding the termination of her employment at WPA?

A. I believe she was asked to leave under some provision, I forget what it was, because she signed a petition for the Communist Party."

Mr. Ford. I show a correction there. Do you?

Mr. Kelley. Yes. Is that "4"?

Mr. Ford. That is a correction where he speaks of what his wife did.

The Court. I think that is just a check mark.

Mr. Kelley. Yes, it is just a check mark across there.

176 Mr. Ford. No relation at all?

Mr. Kelly. No.

Mr. Ford. All right.

Mr. Kelley. The question was:

"Q. Was that the extent of her participation in the activities of the Communist Party?

A. I think so.

Q. The Commission has received information that in your home at the various addresses which you had in New York City there was a large amount of Communist literature. Was there any particular reason for that?

A. I don't know if there was a large amount, I don't know if there was any particular reason.

Q. Do you recall any amount of Communist literature?

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A. I remember seeing leaflets, if you live on the East Side you can't help seeing them.

Q. In your own home?

A. Yes, they are stuck under doors regularly.

Q. Did you or your wife participate in the distribution of it?

A. Am I answering for me or my wife?

Q. You may answer for both.

A. For myself, no, for my wife she can talk for herself, I don't know.

Q. The Commission has received information to
177 the effect that early in 1940 your wife circulated Communist Party petitions. Did you assist her in that circulation?

A. I don't recollect her doing it and I certainly did not assist her.

Q. Were you a member of the Teachers Union in New York City that was removed from the American Federation of Teachers?

A. I don't know about that. I was no member of no Union."

Mr. Ford. Now, that suggests a correction. "b", page 9.

"I was not a member of the Teachers' Union."

Mr. Kelley. Now starting again:

"Q. The Commission has received information to the effect that you were a member of the East Side Defense Council. Is that information correct?

A. That is true.

Q. What is the nature of that organization?

A. It was an organization under the presidency of the Councilman of the City of New York for the East Side and devoted primarily for civilian defense.

Q. What was the Councilman's name?

A. Myer Goldberg.

Q. Did you have office in the organization?

178 A. Yes.

Q. What office did you hold?

A. Secretary.

Q. Who were some of the other officers?

A. Rev. Zabek, I think the initial is R. He was—I don't remember the church, the Polish Church, Rev. Rector of the Church. There was a Rabbi Newman, Julius Newman.

Q. What was his capacity?

A. He was also vice president. There was a Mr. L. Sverdlove, he is a trade unionist, there was a Mr. Alfred Tanz, a lawyer, there was Mr. Harry Schlacht, publisher of the East Side News. I think there was a Rabbi Berman Bergman, I am not sure if he was vice president or director, I know he came to policy meetings. I think there was a Mr. Solender, a social worker, that is a he, Sanford Solender. It should be extremely easy to get everybody.

Q. When did that organization come into existence?

A. Late 1941, I think September or October, October I guess it was.

Q. Was that organization affiliated with the International Workers Order?

A. No.

Q. Was there any connection between the two

179 groups at all?

A. No.

Q. Were you a member of the International Workers Order?

A. I think I was for a brief period, I don't recall, I know I was asked several times, that is why I say I may have been, if so it was a very short period, I found the medical benefits were not what I wanted. It was insurance."

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Mr. Ford. Now, that suggests a correction—"c".

"I do not recall."

Mr. Kelley. That corrects his answer. The question being:

"Were you a member of the International Workers Order?"

The answer here says:

"I think I was for a brief period."

That portion was corrected to say:

"I do not recall."

Mr. Ford. That is right; correct.

Mr. Kelley. We will go back to the testimony now:

"Q. Did you have insurance in the organization when you were in?

A. That is what I am saying, I may have been a member, membership gives medical benefits, but I just don't recall if I was or how long. I did recall when I looked at the benefits they were not what I
180 wanted. My wife was ill and I wanted specialist benefits.

Q. Do you recall whether you contributed any money to the organization?

A. No, I don't.

Q. Did your wife receive any benefits from it?

A. I just don't recall.

Q. What other organizations have you been affiliated with other than religious, fraternal, labor or union?

A. What do you mean beside that? You mean the Oxford Dramatic Society?

Q. Such as that.

A. I was a member of the Williams Club, Oxford Dramatic Society, that is probably about all I guess.

Q. Do you recall any others?

A. Could be. I just don't recall any at present.

Q. Do you know Eugene Morley?

A. Yes.

Q. Who is he?

A. He is a boy I knew in Scranton, Pennsylvania, about 15 years ago, 14 years ago. I have known him ever since from time to time. In the last 8 or 9 years we didn't see as much of each other as we used to. He was an artist and I would stay with him when I came down from New York.

181 Q. What does he do?

A. You mean in the 15 years?

Q. What is he doing now?

A. The last few years? Art work of various sorts. He is an expert on silk screens.

Q. Didn't you circulate some nominating petitions for Earl Browder?

A. No.

Q. The Commission has received information to the effect that on February 22, 1941, you spoke at a Defend America Rally at Manhattan Plaza, 66 East 4th Street, New York City, under the auspices of the International Workers Order; is that information correct?

A. What was the date, please?

Q. February 22, 1941.

A. Well, I don't remember exactly. Could be. I don't know about the date, as secretary of the Defense Council I spoke to innumerable rallys under all auspices. It could be one of those, I wouldn't want to say yes, any particular date. I do not deny that I could have spoken to one or several for that matter.

Mr. Ford. Now, it suggests a change there.

"I spoke to meetings of the American Legion, Jewish religious and fraternal organizations,

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churches, synagogues, Democratic and Republican
182 clubs, settlement houses, boys' clubs, youth clubs, Chamber of Commerce, schools, parent-teachers meetings, market associations, and dozens of others. It could be one of those. I wouldn't want to say yes, any particular date. I do not deny that I could have spoken to one or several, for that matter."

Mr. Kelley. Now back to the testimony:

"Q. Including the International Workers Order?

A. Including the International Workers Order."

Mr. Kelley. And there is a correction here.

Mr. Ford. Yes, there is one at "e".

"May I point out that in the East Side of New York, that organization reaches into many families, and its large rallys have audiences that fill large halls. It was my duty as Executive Secretary of the Defense Council to speak to meetings of citizens whenever possible."

Mr. Kelley. Now back to page 12, I believe:

"Q. Do you recall specifically speaking under the auspices of the International Workers Order?

A. Well, that is what I was trying to remember when I asked for the date. I just don't recall but it could have well been. I don't wish to imply that I wouldn't.

Q. Have you ever been a member of the German-American Bund?

183 A. No.

Q. Have you ever been a member of any Nazi group?

A. No.

Q. Have you ever been a member of any Fascist organization?

A. No.

Q. Are you now or have you been a member of the Communist Party?

A. No.

Q. Have you ever attended meetings of the Communist Party?

A. I don't think so.

Q. Have you ever belonged to any organization which was affiliated with the Communist Party?

A. No.

Q. Have you ever used the name of Tony Whales?

A. No.

Q. Have you ever used a name similar to that?

A. No.

Q. Has your wife ever used the name of Edith Charles?

A. No, as far as I know.

Q. The Commission has received information to the effect that you were a section organizer for the Communist Party on the East Side in New York City under the name of Tony Whales. What com-
184 mend do you have to make?

A. The answer is no.

Q. The Commission has received information to the effect that you made speeches against the conscription bill, is that information correct?

A. No.

Q. Have you ever signed a nominating petition for the Communist Party?

A. I could have. Yes, I think I could have.

Q. Well, have you?

A. Well, the answer I give you is, the FBI brought to my attention the fact that they thought I had, I couldn't recall, but I don't recall any specific instance, it could be yes.

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Q. (Handing a photostat copy of a Communist nominating petition to Mr. Marzani). I will hand you Exhibit A which is a photostatic copy of a nominating petition for the Communist Party to which your name is purportedly signed on January 19, 1940, and I will ask you if that is your signature.

A. Yes, it is.

Q. Do you now recall signing it?

A. I don't recall—well, yes, I do, as a matter of fact, now that I see the date. It was early 1940, I don't remember the day, but I remember there was
185 occasion to sign the petition at that time.

Q. What were the circumstances surrounding this petition being presented to you for signature?

A. I think it was a campaign to elect Mr. Browder."

Mr. Ford Then there is a "g".

Mr. Kelley. The last sheet.

Mr. Ford. I will read the complete answer:

"I think it was a campaign to elect Mr. Browder. In fact, I recollect the occasion now. Mr. Browder had just been sentenced to what I considered an unduly harsh sentence in view of the offense committed. It seemed to me a clear case of civil liberties. I may add that the sentence was later commuted by Presidential order, I believe on grounds of undue harshness."

Mr. Kelley. At the top of page 14, now:

"Q. You were aware of that at the time, were you?

A. Yes.

Q. Did you read the petition before signing it?

A. Not too carefully, but I knew what I was signing.

Q. Among other things contained in that petition is the statement that you intend to support the candidates of the Communist Party. Did you intend at the time to give active support to the Communist Party candidates?

A. I don't recall my intentions at the moment. I—what I meant to accomplish by signing my name
186 was to nominate them.

Q. Have you signed any other Communist petitions?

A. Not that I can recollect.

Q. Do you know Henry Cooper, who witnessed your signature?

A. No.

Q. Do you know Israel Amter?

A. No, I know the name.

Q. Have you met him?

A. No.

Q. Do you know Morris Salkind?

A. No.

Q. Do you know Carl Brodsky?

A. No.

Q. Do you know Ada Brodsky?

A. No.

Q. Do you know Gertrude Ackerman?

A. No.

Q. Do you know Earl Browder?

A. No.

Q. Do you feel you have had a fair and impartial hearing today?

A. Yes.

Q. Do you feel you have had ample opportunity to answer the questions?

187 A. Yes.

Q. Do you feel you have had ample opportunity to answer the questions?

A. Yes, indeed.

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Q. Is there anything further you want to add to the record touching upon any of the matters we have discussed or anything else that might affect your suitability? The record is open.

A. I have nothing to say since I have seen no evidence—am I on trial here?

Q. No.

A. Then there is nothing to say. On the question which you asked have you spoken at the International Workers Rally, the answer is, on the East Side there are numerous organizations of all kinds and it may quite possibly be that I spoke at the International Workers Rally among all the others I have spoken."

Mr. Kelley. Which concludes the transcript, the Exhibit No. 22.

Mr. Ford. Yes.

* * * * *

199 Mr. Kelley. While I tendered these two prospective exhibits to the defense counsel, so he could go over them before I proceed to offer them in evidence, I will make the offer immediately on the basis that
200 the indictment charges that the investigation in the fifth, sixth, seventh, eighth and ninth counts was conducted in accordance with rules and regulations of the United States.

I offer it in evidence on the basis of its certification, and also the other document which we will come to in a moment.

Mr. Ford. That is the other one you handed me?

Mr. Kelley. As constituting a certified copy of the rules and regulations of the Civil Service Commission in relation to the conduct, the nature and standards to be followed in investigations concerning loyalty.

Mr. Ford. This is the other one you handed me (indicating).

The Court. All right, sir.

I will receive these.

Mr. Kelley. Let the record show the exhibit we have been talking about is Government's Exhibit 24.

The Court. And that is Departmental Circular No. 222, of June 20, 1940.

Addressed to Heads of Departments and Independent Establishments.

(Government's Exhibit 24 for identification was received in evidence.)

Mr. Ford. The next one you handed me was 24-A, wasn't it, Mr. Kelley?

201 Mr. Kelley. 24-A; yes.

Mr. Ford. I object on the same grounds as to that, your Honor.

The Court. That being what, sir?

Mr. Kelley. It is certified as being offered for the same basis, as a regulation of the Government.

The Court. As to what, sir?

Mr. Kelley. To the conduct of hearings.

The Court. The procedure following the requesting of removals?

Mr. Kelley. Yes, sir.

The Court. Rules and regulations of the Civil Service Commission?

Mr. Kelley. Yes, sir.

The Court. It may be received.

Mr. Ford. Over my objection.

(Government's Exhibit 24-A for identification was received in evidence.)

* * * * *

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Government
Exhibit 24

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON, D. C.

June 20, 1940
CX:JF:am.

Departmental Circular No. 222

Subject: Removal of undesirable persons from Government Service

To Heads of Departments and Independent Establishments:

"Attention is invited to Section I of Civil Service Rule XII, regulating removals from the classified service, which reads as follows:

> 'No person in the classified service of the United States shall be removed therefrom except for such cause as will promote the efficiency of the service, and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing answer, reasons for removal, and of the order of removal shall be made a part of the records of the proper department or office, as also shall the reasons for reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Commission shall also, upon request, be furnished copies of the same"

"It will be noted from the foregoing rule that all that is required to effect the removal of an employee from the classified service is that he be given notice of the charges against him in writing and afforded a reasonable time to answer in writing. No examination of witnesses is required nor any trial or hearing except in the discretion of the officer making the removal.

"Section 2 of Rule XII requires that in removals, reductions, and other disciplinary actions, like penalties be imposed for like offenses and that no discrimination be exercised for political or religious reasons. Section 9A of the Act of August 2, 1939, the so-called Hatch Act, however, provides as follows:

> '(1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.
>
> '(2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any act of Congress for such position or office shall be used to pay the compensation of such person.'

"It will be noted from the foregoing statute that the removal of any person who is a member of a political party or organization which advocates the overthrow of our constitutional form of Government in the United States is mandatory. This ground for removal, therefore, constitutes an express statutory exception to the provision in Section 2 of Civil Service Rule XII prohibiting removals for political reasons.

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"The Civil Service Commission has implemented Section 9A of the Hatch Act by ruling that as a matter of official policy it will not certify to any department or agency the name of any person when it has been established that he is a member of the Communist party, the German Bund, or any other Communist, Nazi, or Fascist organization. This ruling is parallel to subsection (4) of section 15 of H. R. Res. 544, making appropriations for work relief and relief for the fiscal year 1941, which was passed by the House of Representatives of May 23, 1940."

This subsection reads as follows:

"No alien, no Communist, and no member of any Nazi Bund organization shall be given employment or continued in employment on any work project prosecuted under the appropriations contained in this joint resolution and no part of the money appropriated in this joint resolution shall be available to pay any person who has not made or who does not make affidavit as to United States citizenship and to the effect that he is not a Communist and not a member of any Nazi Bund organization, such affidavit to be considered prima facie evidence of such citizenship and that he is not a Communist and not a member of any Nazi Bund organization."

The attention of all departments is further invited to the fact that every employee of the Government who has taken an oath of office has sworn (or affirmed) that he will support and defend the Constitution of the United States against all enemies foreign and domestic and that he will bear true faith and allegiance to the same.

"In view of the exigencies of the times, the Commission believes that Government agencies may freely take

these matters into consideration in determining whether the removal of a particular employee 'will promote the efficiency of the service' within the meaning of Section 1 of Civil Service Rule XII. Final decision in that respect in any event rests with the department or agency concerned, and the Commission is expressly prohibited by the civil service rules (Section 4, Civil Service Rule XII) from reviewing the findings of a removing officer or investigating any removal or reduction unless it is alleged with offer of proof that the *procedure* prescribed by Section 1 of Rule XII has not been followed, or that the removal was made for political or religious reasons. As stated above, however, membership in a political party or organization which advocates the overthrow of our constitutional form of government constitutes a ground for mandatory removal and the Commission, therefore, will not investigate any removal which the department or agency reports was made pursuant to Section 9A of the Hatch Act." (Italics supplied)

Representatives of any agency who desire to secure more detailed information with respect to the separation of undesirable employees should contact Mr. James E. Hatcher, Associate Chief of the Commission's Investigations Division.

By direction of the Commission:

Very respectfully,

S/. L. A. MOYER
L. A. Moyer
Executive Director and
Chief Examiner

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Government's
Exhibit 24-A

Affidavit of Examining Director and Chief Examiner

LAM:am

December 12, 1940

The Commission:

Minute 1 of October 28, 1940 was adopted in an effort to prevent delays in the submission to departments and agencies of requests for the removal of employees. There is still some confusion in handling this type of case because the minute of October 28, 1940 merely amended Minute 2 of September 9, 1936. I am, therefore, recommending that Minute 2 of September 9, 1936 and Minute 1 of October 28, 1940 be revoked and the following minute adopted in lieu thereof:

Procedure followed in requesting Removals

Before recommending the removal of an employee, the Investigating Division shall, either in a personal interview or through correspondence, acquaint the employee with the nature of the derogatory or unfavorable evidence and give him an opportunity to submit evidence in explanation or rebuttal.

When the foregoing procedure has been followed and a decision has been reached to request the removal of an employee, the submission of the request to the department or agency concerned will not be delayed and any appeal from the action taken must be initiated by the employee, his representative or the Government agency in which he is employed.

Where the retention of an individual pending completion of investigation and final action by the Commission would constitute an immediate danger or menace to the service, the department or agency concerned should be advised informally of the nature of the charges and the evidence secured so that the department or agency may on its own initiative take whatever protective measures it considers warranted.

Minute 2 of September 9, 1936 and Minute 1 of October 28, 1940 are revoked.

L. A. Moyer
Examining Director and
Chief Examiner

212 Mr. Kelley. My next evidence will be of the transcript of the hearing. I want to identify it. Before the Board of Appeals and Review, it was. These documents give rise and explain why such hearing was held in the first place, because he appealed from a previous finding of ineligibility, requested an appeal to the Board, and my next item of proof is that there was a hearing had. It is offered solely for that purpose.

The Court. If you want it to be received, sir, I will receive them.

Mr. Ford. No objection, your Honor.

213 (Government's Exhibits 26, 27, and 28, for identification, were thereupon received in evidence.)

(Counsel returned to the trial table.)

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Mr. Kelley. The Government desires permission to read to the jury Government's Exhibits 26, 27, and 28.

The Court. All right.

Mr. Kelley. Government's Exhibit 26 is asserted to be a certified copy of the original document in the files of the United States Civil Service Commission.

It is dated January 9, 1943, addressed to Mr. James B. Opsata, Personnel Officer, Office of Strategic Services, Washington, D. C.

It is a letter from L. A. Moyer, Executive Director and Chief Examiner.

It reads:

"Dear Mr. Opsata:

"In compliance with the request contained in your letter of March 9, 1942, the Commission has made an investigation concerning Mr. Carl A. Marzani, serving in the Research and Analysis Branch of your establishment, the appointment having been made under Executive Order 8564 subject to investigation.

"As a result of the investigation the Commission has reached the conclusion that Mr. Marzani's suitability for responsible Government employment has
214 not been established. He has, therefore, been rated ineligible and your agency is requested to separate him from his position and to advise the Commission when such action has been taken. In effecting this separation the provisions of Civil Service Rule XII need not be observed.

"There is enclosed for the confidential information of your agency a copy of an analysis of the evidence on the basis of which the Commission made its decision.

"By direction of the Commission:

"Very respectfully,"

Again, the date of that letter is January 9, 1943.

Government's Exhibit 27, being a certified photostat of an original document from the files of the United States Civil Service Commission. It bears the letterhead of Office of Strategic Services, Washington, D. C. The letter is dated February 10, 1943. It is addressed to Mr. L. A. Moyer, Executive Director and Chief Examiner, U. S. Civil Service Commission, Washington, D. C. It is signed by James B. Opsata, Director of Personnel, Office of Strategic Services.

It reads:

"Dear Mr. Moyer:

"This is in reference to your letter of January 9, 1943 (File BAR: AK:MGW) setting forth the
215 results of the investigation conducted on Mr. Carl A. Marzani.

"Mr. Marzani has been notified that he has been rated ineligible. It is our understanding that he will appeal the Commission's decision. The office of Strategic Services is not appealing the decision but until the results of the appeal are known we wish to allow Mr. Marzani to continue working in his present position.

"Expeditious processing of the appeal will be appreciated."

And Government's Exhibit 28 is a certified copy of a photostat of an original document in the files of the United States Civil Service Commission.

It likewise appears on the letterhead of the Office of Strategic Services, Washington, D. C., and is dated February 10, 1943.

It is addressed to the Board of Review and Appeals, Civil Service Commission, Washington, D. C.

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It is signed by Carl A. Marzani, Chief, Editorial Section, Presentation Division.

There is a notation that a copy goes to Mr. James B. Opsata.

It reads:

"Dear Sirs:

"I have been notified by the Director of Per-
216 sonnel of the Office of Strategic Services that the Civil Service Commission holds that my suitability for Government employment has not been established. I should like to make formal appeal of this decision to your body.

"This request for appeal is being taken with the knowledge of Mr. James B. Opsata, Director of Personnel of the Office of Strategic Services.

"I should greatly appreciate an opportunity to discuss this matter with you and to ascertain the basis of the Commission's findings."

* * * * *

286 Mr. Kelley. I offer it in evidence.

The Court. It may be received.

(Government's Exhibit No. 18 for identification was received in evidence.)

Mr. Kelley. I request permission of the Court to read it to the jury.

The Court: Yes, you may read it.

Mr. Kelley. Members of the jury, this is a certified photostatic copy of a letter dated December 20, 1946, addressed to Mr. Carl Aldo Marzani, from J. Anthony Panuch, Deputy Assistant Secretary for Administration.

"Dear Sir:

"After careful consideration, it is deemed necessary and advisable in the interests of the United States that your employment in the Department of State be terminated. Accordingly, pursuant to the provisions of Title 1 of Public Law 490, 79th Congress, 2nd Session, you are hereby advised that your employment in the Department of State is hereby terminated, effective as of the close of business December 20, 1946."

287

* * * * *

Mr. Kelley. Now, if the Court please, I offer on the basis of this certification, Government's Exhibits 31 and 32, which counsel has observed, and I understand raises no objection to their receipt in evidence.

334

Mr. Ford. That is correct, your Honor.

(The exhibits were handed to the Court.)

The Court. Very well, sir, they may be received.

(Government's Exhibits 31 and 32 were marked for identification and received in evidence.)

Mr. Kelley. I desire permission to read them to the jury, or portions of them.

The Court. Very well, sir.

Mr. Kelley. Government's Exhibit 31, a certified photostatic copy of an official document from the files of the United States Civil Service Commission, is dated July 29, 1943, and addressed to the Office of Strategic Services, Washington, D. C., attention of Director of Personnel.

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"Gentlemen:

"Reference is made to your letter of February 10, 1943, in regard to Mr. Carl A. Marzani, presently employed as Economic Editor in your agency.

"Careful consideration has been given to Mr. Marzani's entire record, including representations
335 made by him and for him at a hearing before the Board of Appeals and Review of this office. The conclusion has been reached that he meets the standards of suitability maintained for appointment in the Federal service, and the Commission has rated him eligible for Government employment. The request that his services be terminated is accordingly withdrawn.

"By direction of the Commission:

"Very respectfully,
"L. A. Moyer"

Government's Exhibit 32 is a certified photostatic copy of an original document from the files of the United States Civil Service Commission.

It is dated July 29, 1943, and addressed to Mr. Carl A. Marzani, c/o Mr. Hugh C. Barton, R. F. D. 3, Vienna, Virginia.

"Dear Mr. Marzani:

"Reference is made to your personal appeal from the action taken in requesting the Office of Strategic Services to terminate your services as Economic Editor because of apparent unsuitability for Government employment.

"Careful consideration has been given to your entire record, including the representations made by you and for you at the hearing before the Board of Appeals and Review of this office. The conclusion
336 has been reached that you meet the standards of

suitability maintained for appointment in the Federal service. The Commission is pleased to advise you that you have been rated eligible for Government employment.

"By direction of the Commission:

"Very respectfully,
"Wm. C. Hull"

* * * * *

Mr. Ford. May it please your Honor, before this,
397 in accordance with your Honor's directions, I will stipulate that as to Government's Exhibits 34-A, 34-B, and 34-C, that the signature thereon in each of them at the bottom is the signature of the defendant Carl Marzani.

* * * * *

Mr. Kelley. In view of the stipulation, your
399 Honor, the Government offers in evidence Exhibits 34-A, 34-B, and 34-C.

Mr. Ford. That is, we consent to that and agree to it with the proviso of what was involved in the motion. It is with that reservation.

The Court. Yes, sir. They will be received in evidence.

(Government's Exhibits 34-A, 34-B, and 34-C, were received in evidence.)

* * * * *

458 By the Court:

Q. Do you know whether any memberships were solicited either for the Congress or for the Communist Party there that night, sir?

A. At the meeting in the Church?

Q. At the Church meeting, yes.

A. Yes, sir. We asked people to join the National Negro Congress, East Side Council. We gave them the names and addresses of persons, some who joined that night, and those who didn't join that night, they were given names of persons who were the responsible leaders of the Council.

Whether or not there was any solicitation for membership in the Communist Party, that I don't know.

* * * * *

666 By Mr. Ford:

Q. I will ask you whether or not, on August the 24th, you made a statement, either written or oral, that the comrades at a party at Jean Madof's, 408 East 10th Street, included Bob Appel, Frances Sutton, Louis Harper, Elsie Harper, all members of C. P., 6th A. D.

A. Yes, sir.

* * * * *

The Court. I wanted to say something to Mr.
677 Ford, Mr. Kelley.

Mr. Ford, when you do make your opening statement, I ask you to be governed by the issues in this case, so that it won't be necessary for me to say anything.

Mr. Ford. What I am going to say, I think, are all the issues in this case and are properly admissible.

The Court. I dislike to interrupt people in the midst of things and inject them.

Mr. Ford. I don't mind, your Honor.

The Court. If you do go beyond what I believe to be the issues, I will ask you to come up here.

Mr. Ford. I will stop immediately.

678 The Court. But I will do it so as not to make it appear I am cutting in on you.

Mr. Ford. Any signal from your Honor and I will immediately come up.

(Counsel returned to the trial table.)

The Court. Mr. Ford, you may proceed with your opening statement.

OPENING STATEMENT ON BEHALF OF DEFENDANT

By

MR. CHARLES E. FORD

* * * * *

681 That there came a time in 1941, about the spring, and the war clouds at that time were very strong and there was considerable unrest in this neighborhood amongst the different nationalities; so, honestly believing war was imminent and equally honest that it was not, the neighborhood got together before we were attacked and they organized what later became known as the National Defense Committee, and the city authorities in New York, led by a Meyer Goldberg, I think was his name, who was then a councilman in the city, went and these people solicited Mr. Marzani and asked him to organize the neighborhood and see if he could get the different nationalities to forget

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their particular differences and all unite in preparedness, because at that time President Roosevelt was telling all of the citizens to organize and prepare, and that that was one of the first——

The Court. Mr. Ford, May I interrupt you, sir?

Mr. Ford. Yes, sir.

* * * * *

858 (Thereupon Defendant's Exhibits 9 and 10 for identification were received in evidence.)

* * * * *

Mr. Ford. Ladies and gentlemen of the jury, I
860 am now going to read from Defendant's Exhibit number 9, the official document which the Court has admitted in evidence.

It has here, "Department of State, Payroll Period. Carl A. Marzani, Deputy Chief, Carl A. Marzani, Carl A. Marzani." And down at the bottom it reads:

"Terminated effective November 15, 1946, COB, pending leave status, per form 184."

In addition, Defendant's Exhibit number 10, being this document, has at the top, "Payroll Section. From L. F. Brockdorf; name of administrative officer; division; presentation; first floor; Washington Auditor number," then the phone number.

"Subject: Change in Personnel."

"Please note the following change in personnel, effective 11-15-46."

"Name: Carl A. Marzani."

Then there are three blocks opposite each. One is:

"Entered or duly transferred."

The other:

"Terminated."

And the one "Terminated" has a check mark in it.

Then at the bottom it says:

"Please send all monies due to Carl A. Marzani, 508 North Fillmore Street, Arlington, Virginia.".

861 At the bottom it has "Department of State, Notice of Changes in Personnel."

* * * * *

987 By Mr. Kelley:

Q. Coming to the time when you state you had returned to this country, worked your way eastward
988 and to New York City and environs, I believe you said you first took up residence where?

A. With my wife's parents.

Q. And their name is what?

A. Stanley Eisner and Babette Eisner.

Q. Where do they live?

A. South Orange, New Jersey.

Q. They are in comfortable circumstances?

A. Yes.

Mr. Ford. I object as being immaterial.

Mr. Kelley. I am laying a foundation, your Honor.

The Court. Suppose you approach the bench.

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

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Mr. Kelley. Your Honor, this witness has put his character in evidence for veracity, truth, honesty, integrity and loyalty.

I intend to prove by this witness that he, in the presence of his wife, went to welfare agents in the City of New York in 1939, and in his presence the statement was made by his wife in connection with an application he had made for relief for both of them, that her parents were dead.

That her mother had died at the time of her birth in Joplin, Missouri, and other statements to that effect, all when they were alive, well, and in comfortable cir-
989 cumstances at the time, in New Jersey.

I submit that it is entirely proper.

Mr. Ford. I object to anything his wife did. He is talking about what his wife did and I object to any evidence about what his wife did. He did not put his wife's integrity into issue and it is not in issue in this case. It is his own.

The Court. What are you going to show about his part in it, Mr. Kelley?

Mr. Kelley. I am going to show that he went with his wife and that he filed an application for relief for himself and wife, and that with his wife he went to the welfare department and in his presence and in the presence of the witness, she made the statement and possibly he did too, but I don't have to go that far, the statement was made by her that her parents were dead, and so on, as indicated, in his presence, and certainly that would affect his veracity in connection with those circumstances.

The Court. Let me ask you definitely:

Are you going to be in a position to show that that was done either by him or in his presence?

If you are going to show it definitely, that is one thing, but if you are not going to show it, that is another situation.

Mr. Kelley. Yes. The matter appears also par-
990 tially by admission in the proceedings.

But I have the transcript of the WPA reporter, to this issue.

If he denies it, I am in a position to establish it.

Mr. Ford. I ask that he be required to show that to your Honor first.

Mr. Kelley. I will be glad to.

The Court. Very well.

Mr. Kelley. I can bring into court, I am informed, the persons who made these reports (handing reports to the Court).

The Court. This is her father, in here (indicating)?

Mr. Kelley. Yes, sir.

(Whereupon, the Court perused the document.)

The Court. Is this the only place that you refer to about the death?

Mr. Kelley. This document is certified on the rear, but I am informed that I can get the witness here to testify to the facts contained therein.

(Whereupon, Mr. Ford perused the document.)

Mr. Ford. It does not show that he did anything at all.

The Court. He was present during that time, sir.

Mr. Ford. It does not say that he was present at that time here at all (indicating). The paragraph your Honor referred to, I find nothing in there that says he was present.

That is to say, the paragraph beginning with
991 "Mrs. M." And ending up with the word "address."

The Court. This is all relating to the interview of 8:30.

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Mr. Ford. Furthermore, the best evidence is the person who made the interview.

Mr. Kelley. I am just laying a foundation.

The Court. Yes. My purpose here was to make sure that we were not getting in something that he could not support, sir.

Mr. Ford. I object to anything about his wife or his wife's parents.

The Court. I understand what you are trying to do is lay the foundation so that you can show that he was present when these things were shown.

Mr. Kelley. Yes, your Honor, and if he denies it, I will produce the proof to that effect.

The Court. Very well, sir.

Mr. Ford. Further, I object, if he is laying a foundation, that he not repeat what was said, but only be limited to laying foundation and whether he was there at a certain time.

The Court. He would have to identify it further than that, sir?

Mr. Ford. Then it would be too late, and the jury
992 would have heard what he said.

The Court. I will let him answer the question.

(Counsel returned to the trial table.)

Mr. Kelley. Your Honor, I would like to take two or three minutes, and if you want to recess now I can get some papers together and save some time.

The Court. Very well.

Ladies and gentlemen, you are excused for a few minutes, with the same admonitions as heretofore given you by the Court.

(There was a brief informal recess, at the conclusion of which the proceedings were resumed, as follows:)

The Court. Mr. Kelley and Mr. Ford, will you come to the bench, please?

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

The Court. Mr. Kelley, I want to be doubly sure that there is no question about the proof as to Mr. Marzani and his wife being present at the time.

Mr. Kelley. That is my information, your Honor.

In the first instance, it is in the report and the date is there.

May I get the report and show it to your Honor?

The Court. Yes.

993 (Mr. Kelley obtained the report.)

Mr. Kelley. Moreover, if there is any doubt in your Honor's mind, I want to get the transcript of the proceedings.

The Court. Mr. Kelley, I will deny it at this time anyhow.

Mr. Kelley. May I renew this request later?

The Court. Yes.

Mr. Kelley. May I ask him if he was present during a conference with the welfare department agent and was his wife present during the time the question of whether the parents were living was discussed?

And would your Honor rule on that? Just, was he present at a visit where a representative of the department

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of welfare, himself and his wife, at which time there was a conversation had concerning the death of the parents? I will stop there.

The Court. All right, sir.

Mr. Ford. There is a part of the hearing which I have marked off which relates to all of this.

In the Board of Review hearing he was asked quite a bit about this, and that is also a part of that record.

The Court. I have not read it as yet, Mr. Ford.

Mr. Ford. But just in passing, your Honor might want to remember it.

The Court. Of course, Mr. Kelley, you will un-
994 derstand that he is supposed to be present at the time the particular thing happened, and that is continuously present.

Mr. Kelley. Yes.

The Court. And you will not go further?

Mr. Kelley. No.

(Counsel returned to the trial table.)

By Mr. Kelley:

Q. Mr. Marzani, when you first took up residence in New York City, where did you live?

A. I lived for about a month somewhere on East 30th, I think.

Q. With whom?

A. My wife.

Q. Did someone else live——

A. No, I am sorry, sir. I misunderstood your question. I thought you meant after I came back. I take it you mean before.

Q. No, I mean after you came back from Europe. When you first lived in New York City, where did you live at that time?

A. For about a month somewhere on East 30th.

Q. Did someone else live at that place besides you and your wife?

A. No.

Q. Did you ever live in an apartment leased by a
995 Miss Gickow?

I don't believe so, sir.

Q. State whether or not during the year 1939 you were ever visited by a worker in the department of welfare, New York City, on which occasion the worker for the department of welfare, you, and your wife, were present, during which time a conversation was had concerning the date and place of death of your wife's parents.

Mr. Ford. I object.

The Court. On what basis, Mr. Ford?

Mr. Ford. First, that it has not been identified as to when the meeting took place.

The Court. Can you place the time, sir?

Mr. Kelley. I have placed it in the year. It is for the witness to answer, if he can; during the year 1939, I have made it as broad as possible for him.

Mr. Ford. But I think that is not the only objectionable feature of it.

The Court: Can you make it any more specific, sir?

Mr. Kelley. If your Honor please, I do not desire to.

I have asked the witness "any time during 1939, did such a thing take place?"

Mr. Ford. I object to it.

The Court. I will let him answer it.

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The Witness. I was visited by the department
996 of welfare officials, sir. That much is yes. Specifically, in the detail you have just outlined, I cannot recall.

By Mr. Kelley:

Q. During the periods that you had conferences with representatives from the department of welfare, was your wife present with you.

Mr. Ford. May I make my objection to all of this, please, so I won't have to repeat it?

The Court. Yes.

The Witness. I don't recollect, sir. I assume she must have been, at least part of the time.

By Mr. Kelley:

Q. Did you ever go with your wife to the department of welfare, service section, and converse with a representative of that agency?

Mr. Ford. I object, and ask that a time be located.

Mr. Kelley. I said if he ever did.

The Court. Do you recall the time, sir?

The Witness. No, sir.

May I answer the question?

The Court. Yes, sir; if you can.

Mr. Ford. May I have an objection and exception, your Honor?

The Witness. To the best of my knowledge, Mr. Kelley, since it is seven years ago, I know that I did go
997 to the welfare department; I know the welfare department came to me, but the details that Mr. Kelley is putting in, I really do not recollect.

Mr. Kelley. May we approach the bench for a minute, your Honor?

The Court. Yes.

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice as follows:)

Mr. Kelley. I would like a moment's recess to make a telegraphic inquiry in an effort to get the agent here.

This witness has put in evidence as to his character and I assume the Court will not permit me to go into what he has testified to here on this point in the other hearing.

May I have a recess for a few minutes to put a request through to bring this witness here?

The Court. My whole point, sir, is to this: I don't want anything which is going to indicate that this man was, unless it is a fact that he was.

Mr. Kelley. If I am prepared to have a witness who will testify that in the presence of his wife and this defendant that statement was made, I understand the Court will admit it?

The Court. Yes, sir.

* * * * * *

The Court. Defendant's Exhibit number 1 is received.

1117 (Thereupon, Defendant's Exhibit No. 1 for identification was received in evidence.)

Mr. Ford. Members of the jury, Defendant's Exhibit No. 1 is an official record of the State Department,

1118 and I particularly desire to call the jury's attention to it here,

"Action Requested."

It has "Resignation" written out on the typewriter.

Then it has an ink line drawn above it.

Then above the word "Termination," and a line written through that and the word "Removal" written in its place.

Then down below where it had "Effective date," the date was written in here "COB, November 15, 1946."

Then an ink line was drawn through that and above it was written "December 20" in ink on this record.

* * * * * *

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Supreme Court of the United States

OCTOBER TERM, 1948

CARL ALDO MARZANI,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

No. 59

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR PETITIONER

In its Brief, the Government has raised the new issue of the review by this Court of the holding of the court below, claimed to be error, that the first nine counts of the indictment herein are barred by the statute of limitations (Gov't. Brief pp. 24-43). This issue was not raised by the petition nor by the Government through cross petition for writ of certiorari. On the contrary, the Government strongly opposed the granting of the petition as to other issues in this case which are dependent on the holding of the court below with respect to the first nine counts. It urged that the decision in *United States* v. *Gottfried*, 165 F. 2d 360, 367-368 (C. C. A. 2, 1948) cert. denied 333 U. S. 860 was correct and that no conflict existed between the decision of the Second Circuit in that case and the con-

trary holding of the court below in this case, because the holding here with respect to the statute of limitations was a mere dictum. (Brief in Opposition to Petition, pp. 17-19). Without waiving objection to the failure of the Government to show good cause or exceptional circumstances to invoke the power of this Court to review this issue (See *Federal Trade Commission*, 273 U. S. 66; *Langnes* v. *Green*, 282 U. S. 531, 535-538; *Kessler* v. *Strecker*, 307 U. S. 22, 33), we submit that the holding of the court below on this issue is amply warranted by pertinent statutes and applicable decisions of this Court.

Summary of Argument

POINT IV. THE COURT BELOW CORRECTLY HELD THAT THE FIRST NINE COUNTS OF THE INDICTMENT WERE BARRED BY THE STATUTE OF LIMITATIONS.

Since the first nine counts of the indictment charge crimes under the False Claims Act (18 U. S. C. Section 80 clause 2, now 18 U. S. C. Section 1001) committed more than three years before the indictment was returned, prosecution, trial and punishment of petitioner on these counts is barred by the statute of limitations (18 U. S. C. Section 582, now 18 U. S. C. Section 3282). The Suspension Act (18 U. S. C. Section 590(a) clause 1, now 18 U. S. C. Section 3287) is not applicable to these offenses under the False Claims Act. The Suspension Act suspends the running of the statute of limitations "applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner . . ." It is not applicable in any case

unless two requirements are present in the statute defining the offense: first, the purpose or intent to defraud the United States; and second, pecuniary or property loss to the United States.

In *United States* v. *Noveck*, 271 U. S. 201, *United States* v. *McElwain*, 272 U. S. 633 and *United States* v. *Scharton*, 285 U. S. 518, this Court construed the 1921 proviso to the general statute of limitations and the 1926 proviso to the Revenue Act of 1926, which are in pertinent part identical predecessors of the Suspension Act, as applicable only to offenses in which intent to defraud is an element in the statute defining the offense. Numerous lower court cases without exception are to the same effect. When Congress enacted the Suspension Act, employing the essential language of the 1921 and 1926 provisos, it adopted the construction given by this Court to such language and made it part of the enactment.

"Defrauding" as used in the Suspension Act means the causing of pecuniary or property loss to the Government. This is the primary and ordinary meaning of the word "defrauding" and there are no apt words in the Suspension Act extending its meaning to a broader scope, such as the words "for any purpose" which accompany "defrauding" in the general conspiracy statute. *United States* v. *Cohn*, 270 U. S. 339; *United States* v. *Keitel*, 211 U. S. 370, 373. Other provisions of the Contract Settlement and Surplus Property Acts, of which the Suspension Act is a part, emphasize that "defrauding" is limited to its primary meaning. The House and Senate Committee Reports accompanying the bill also demonstrate the legislative intent to limit suspension to offenses involving pecuniary or property loss to the Government. The court below so construed the statute.

The False Claims Act, defining the offense on which the first nine counts of the indictment are based, punishes "whoever shall knowingly and wilfully . . . make . . . any false or fraudulent statements. . . . in any matter within the jurisdiction of . . . the United States." Neither the intent to defraud nor pecuniary or property loss to the Government is an element of the offenses here charged. The legislative history of the 1934 amendment to the False Claims Act, which eliminated the words with "intent to defraud" and "defrauding" from the prior statute, demonstrates that the intent to defraud is not an element of the offense: this Court has construed the statute as not requiring pecuniary or property loss to the Government. *United States* v. *Gilliland,* 312 U. S. 86. The trial court instructed the jury that pecuniary loss is not an element of the offense. The court below agreed.

Since the Suspension Act is applicable to offenses in which intent to defraud and pecuniary or property loss to the United States are elements under the statute defining the offense, and the False Claims Act is a statute in which neither element is essential, the court below correctly refused to apply the Suspension Act to the offenses under the first nine counts of the indictment.

Argument

POINT IV. THE COURT BELOW CORRECTLY HELD THAT THE FIRST NINE COUNTS OF THE INDICTMENT WERE BARRED BY THE STATUTE OF LIMITATIONS.

Of the eleven counts of the indictment (R. 2-19), the first nine charge that petitioner in violation of the 18 U. S. C. Section 80 clause 2 (now 18 U. S. C. Section 1001, herein-

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after referred to as the False Claims Act)[1] made certain false and fraudulent statements in matters within the jurisdiction of agencies of the United States on or before April 20, 1943 (Count I-IV, July 1942; Counts V-VII, November 1942; Counts VIII-IX, April 1943). The indictment was returned on January 17, 1947 (R. 273). If the general statute of limitations applies (18 U. S. C. Section 582, now 18 U. S. C. Section 3282)[2] these counts are barred.

Prior to, during, and after trial, petitioner moved for this reason to dismiss these counts of the indictment (R. 20, 31, 46). The trial court denied these motions, holding that 18 U. S. C. Section 590(a) clause 1 (now 18 U. S. C. Section 3287, hereinafter referred to as the Suspension Act)[3] applied to these offenses (R. 26-30, 31, 33) and suspended the running of the statute of limitations. The court below held—correctly, we submit—that the trial court's refusal to dismiss these counts was error. The opinion of the court below is discussed in subsection C. below.

The precise issue as to whether or not the statute of limitations is suspended as to these counts turns on whether the Suspension Act, which applies to offenses involving "defrauding or attempts to defraud the United States . . . whether by conspiracy or not and in any manner," applies to the offenses in the first nine counts of the indictment under the False Claims Act, which charged petitioner with having "knowingly and wilfully made false and fraudulent statements in a manner within the jurisdiction of an agency of the United States".

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[1]See Appendix A. p. 1.
[2]See Appendix A. p. 3.
[3]See Appendix A. pp. 2-3.

To determine this issue, it is necessary to consider the legislative history and applicable decisions of this Court relating to the Suspension Act and the False Claims Act.[4]

The essential wording of the Suspension Act, "defrauding or attempting to defraud the United States . . . whether by conspiracy or not and in any manner" derives originally from a proviso to U. S. C. Title 18, §582, enacted on November17, 1921, in connection with war frauds arising out of the first World War.[5] The 1921 proviso read:

> "*Provided, however,* that in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitation shall be six years. . . ."

This proviso was construed by the Supreme Court in *U. S.* v. *Noveck,* 271 U. S. 201 (1926) and *U. S.* v. *McElwain,* 272 U. S. 633 (1926). A proviso enacted in 1926 in identical language, to U. S. C. Sup. V. Title 18 §585,[6] Appendix A, p. 4, was further construed by the Supreme Court in *U. S.* v. *Scharton,* 285 U. S. 518 (1932). To overcome the effect of these decisions, all holding the language of the proviso inapplicable to the offenses charged, the Revenue Act of 1926 was amended (See *Braverman* v. *U. S.,* 317 U. S. 49, 54-5).

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[4]The legislative history of the False Claims Act is discussed in Subsection B, *infra.*

[5]Appendix A. pp. 3-4.

[6]Appendix A. p. 4.

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Shortly after the United States became involved in the second World War, the Act of August 24, 1942 was enacted. This act provided, in pertinent language identical with that of the 1921 and 1926 provisos:

> "The running of any existing statute of limitations applicable to any offense against the laws of the United States, involving defrauding or attempts to defraud the United States whether by conspiracy or not, and in any manner and now indictable under any existing statutes shall be suspended until June 30, 1945 or such earlier time as the Congress by concurrent resolution or the President may designate." [7]

In July 1944, the Act of August 24, 1942 was amended by the Contract Settlement Act of 1944,[8] and, in October 1944, by the Surplus Property Act of 1944,[9] which eliminated the phrase "now indictable under any existing statutes", added the clauses now numbered (2) and (3) and changed the suspension date from June 30, 1945 to three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress (See Appendix A).

In all essential respects, however, clause 1 of Sec. 590 (a) is identical with the 1921 proviso to U. S. C. Title 18, §582, the 1926 proviso to U. S. C. Sup. V, Title 18, §585 and the Act of August 24, 1942.

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[7] Appendix A. p. 5.
[8] Appendix A. pp. 5-10.
[9] Appendix A. pp. 10-13.

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A. The Suspension Act is Applicable Only to Offenses in which Intent to Defraud and Pecuniary or Property Loss to the United States are Elements under the Statute Defining the Offenses.

(1) INTENT TO DEFRAUD THE UNITED STATES.

Since Congress, in enacting the Suspension Act, employed the essential language of the 1921 and 1926 provisos, it is clear, under well settled rules of statutory construction, that it adopted also the construction given by this Court to such language and made it a part of the enactment (*Shapiro* v. *United States,* decided June 21, 1948, 92 L. Ed. 1426, 1433; *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 488, 489; *United States* v. *Ryan,* 284 U. S. 167, 175. This view is confirmed by the legislative history of the Act of August 24, 1942. Both the House and Senate Reports [H. Rpt. 2051 and S. Rpt. 1544 to accompany H. R. 6484, 77th Cong. 2nd Ses.] refer specifically to the 1921 proviso, the circumstances surrounding its enactment and the necessity for a similar suspension of the normal statute of limitations during the second World War.[10]

The construction given by this Court to the 1921 and 1926 provisos and therefore properly to be given to the Suspension Act, is that suspension of the statute of limitations is applicable only where the defrauding or attempting to defraud the United States is an essential ingredient under the statute defining the offense. One essential ingredient in such defrauding is the purpose or intent to defraud.

In *United States* v. *Noveck, supra,* the defendant was indicted for perjury (Sec. 125 of the U. S. Criminal Code) for having falsely understated his taxable income. The

[10]See Appendix A. pp. 15-16.

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offense was committed more than three years before the indictment. The government contended that since the perjury was committed in the making of an income tax return and was specially alleged to have been committed for the purpose of defrauding the United States, the offense was brought within the six year period of limitations of the 1921 proviso, *supra*. This Court affirmed the quashing of the indictment by the District Court on the ground that the prosecution was barred by the three year statute of limitations. The Court stated:

> "But the alleged purpose to defraud the United States is not an element of the crime defined in Sec. 125, on which the indictment is based. That allegation does not affect the charge; it need not be proved and may be rejected as mere surplusage. Re Lane, 135 U. S. 443, 448, 34 L. ed. 219, 221, 10 Sup. Ct. Rep. 760. The construction of Secs. 125 and 1044 contended for by the government divides perjury into two classes. It makes one include offenses having the elements specified in Sec. 125 and the other to include those containing the further element of purpose to defraud the United States. And that would apply similarly to every offense to which the three-year period fixed by Sec. 1044 was applicable before the proviso was added. The effect is to create offenses separate and distinct from those defined by specific enactments. Obviously that was not intended. The Act of November 17, 1921, merely added a proviso to a statute of limitations. Statutes will not be read to create crimes, or new degrees or classes of crime, unless the purpose so to do is plain. The language in question does not require the construction contended for. Indeed it is not at all appropriate for the making of such classifications or the creation of offenses. Its purpose is to apply the

> six-year period to every case in which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense. There are several such offenses. Section 37 affords an illustration. But perjury as defined by Sec. 125 does not contain any such element." (ibid pp. 203-204)

In *United States* v. *Scharton, supra,* defendant was indicted under Sec. 1114 (b) of the Revenue Act of (February 26) 1926 (44 Stat. 116, 27, U. S. C. Supp. V, Title 26, § 1266) and charged with wilfully attempting to evade and defeat taxes for 1926 and 1927 by falsely understating taxable income. The District Court sustained the defendant's plea in bar, that the offenses were committed more than three years prior to the return of the indictment and held inapplicable the six year period of limitation fixed by the 1926 proviso to U. S. C. Supp. V, Title 18, Sec. 585.

In the Supreme Court, the government contended that fraud is implicit in the concept of evading and defeating; that attempts to obstruct or defeat the lawful functions of any department of the government, on the one hand, or to cheat it out of money to which it is entitled, on the other hand, are attempts to defraud in the United States if accompanied by deceit or other dishonest methods. The government's position, broadly, was that any effort to defeat or evade a tax possesses every element of an attempt to defraud.

The Supreme Court rejected this position and affirmed the judgment of the District Court, stating:

> "We are required to ascertain the intent of Congress from the language used and to determine what cases the proviso intended to except from the general statute of limitations applicable to all offenses against the internal revenue laws. Section 1114 (a) makes

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wilful failure to pay taxes, to make return, to keep necessary records, or to supply requisite information, a misdemeanor; and Sec. 1114 (c) provides that wilfully aiding, assisting, procuring, counselling, or advising preparation or presentation of a false or fraudulent return, affidavit, claim, or document shall be felony. Save for that under consideration these are the only sections in the Revenue Act of 1926 defining offenses against the income tax law. There are, however, numerous statutes expressly making intent to defraud an element of a specified offense against the revenue laws. Under these, an indictment failing to aver that intent would be defective; but under Sec. 1114 (b) such an averment would be surplusage, for it would be sufficient to plead and prove a wilful attempt to evade or defeat. Compare United States v. Noveck, 271 U. S. 201, 203, 70 L. ed. 904, 905, 46 S. Ct. 476.

"As said in the Noveck Case, statutes will not be read as creating crimes or classes of crimes unless clearly so intended, and obviously we are here concerned with one meant only to fix periods of limitation. Moreover, the concluding clause of the section, though denominated a proviso, is an excepting clause and therefore to be narrowly construed. United States v. McElwain, 272 U. S. 633, 639, 71 L. ed. 451, 453, 47 S. Ct. 219. And as the section has to do with statutory crimes it is to be liberally interpreted in favor of repose, and ought not to be extended by construction to embrace so-called frauds not so denominated by the statutes creating offenses." (ibid pp. 521-2)

From these decisions, it is clear that where a crime, such as perjury, or the wilful attempt to evade and defeat a tax by false statements, is a distinct offense, complete in itself, and does not involve, as an essential ingredient of the crime,

the purpose or intent to defraud the United States, the suspension statute, based on the 1921 and 1926 provisos and now embodied in the first clause of § 590 (a) does not apply. The Supreme Court has rejected the contention that fraud or the intent to defraud is implicit in such separate crimes. It has refused to allow the 1921 and 1926 provisos to be used to create new classes of crimes involving defrauding, unless clearly so intended and it has refused to find such an intent in these provisos. It has disregarded the form of the provisos and held them to be excepting clauses, to be liberally interpreted in favor of repose and not to be extended by construction to embrace frauds not so denominated by the statutes creating the offenses.

On the other hand, the 1921 proviso has been held applicable to cases where, under the statute defining the offense, the intent to defraud was an essential ingredient of the crime charged. Thus, in *Bailey* v. *U. S.*, 13 F. (2d) 325, in a prosecution under § 29 of the Criminal Code (Comp. St. § 10193, U. S. C. Title 18 Sec. 73) for uttering and publishing a forged indorsement of a check payable by the United States in payment of a claim against the United States, with intent to defraud the United States, the six year period of limitations of the 1921 proviso was held applicable because

> "The defrauding of the United States is a statutory ingredient of the crime charged in the second count of the indictment, at least, and there was therefore no error in the rulings complained of . . ."

In *Weinhandler* v. *United States*, 20 F. 2d 359, cert. den. 275 U. S. 554, in a prosecution under Section 47 of the Criminal Code (Comp. Stat. 10214, U. S. C. Title 18,

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Section 100) for embezzlement of Federal Funds, the six year period of limitations of the 1921 proviso was held applicable, because

> "It is impossible to embezzle the money of another without committing a fraud on him. Uttering and publishing a forged indorsement of a draft of the United States Treasury with intent to defraud the United States is within the proviso. *Bailey* v. *U. S.* (*supra*). In view of these authorities, we hold that fraud is an element of the crime of embezzlement."

In that case, the crime involved a direct and pecuniary loss to the government, and the "defrauding" of the United States that was involved was a necessary ingredient of the offense charged.

In *Falter* v. *United States,* 23 F. 2d 420, cert. denied 277 U. S. 590, defendants, government employees and others were indicted under Section 37 of the Criminal Code[11] for conspiracy to defraud the United States by false statements to a government agency that contracts for goods had not been filled and that, therefore, the buyer was entitled, in substitution, to new disposable goods, as they came in, at prices fixed by the original contract, which were lower than the prices current when the substitute goods were delivered, thus depriving the Government of the difference between the contract and the current price. Intent to defraud is necessarily an element of conspiracy to defraud. The court held the 1921 proviso applicable.

"The fraud was neither an incident nor the purpose of the crime as in *U. S.* v. *Noveck* . . . nor an offense against

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[11]Appendix A., p. 14.

the revenue laws, as in *U. S.* v. *McElwain*. . . . The conspiracy to defraud was the crime and the crime consisted only in the fraudulent conspiracy" (*ibid.*, 426).

To like effect, see:

Evans v. *United States*, 11 F. 2d 37 (Violation of 18 U. S. C., Section 80, prior to 1934 amendment, in a false claim for refund of portion of excise taxes. "The evil which the statute was intended to reach was the obtaining of money from the United States by false pretenses." 1921 proviso *held* applicable).

Miller v. *United States*, 24 F. 2d 353, 361, cert. denied 276 U. S. 638 (Conspiracy to defraud the United States by allowing illegal or suspicious claims, without proper investigation, for a pecuniary reward. "The overt acts charged in furtherance of the conspiracy, and essential to the statutory crime of conspiracy, showed a consummated fraud as against the government and the property rights of the United States. . . . The conspiracy was one not merely to secure the allowance of claims, but to defraud the United States by procuring the payment of the money and to transfer the bonds to the Swiss Corporation 'whereby the United States was to be and was defrauded of its possession and dominion of a large fund under its administration' ". 1921 proviso held applicable).

In re *Doyle*, 42 F. 2d 686 (rev'd per curiam without opinion *United States* v. *Doyle*, 42 F. 2d 1086 (Refusal to answer questions before a grand jury, inter alia, on the grounds of self-incrimination, which could not be claimed if 1926 proviso were inapplicable, where answer might have made witness liable for possible prosecution for conspiracy to defraud the United States in connection with a false

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claim for refund of taxes. 1926 proviso *held* applicable).

All of these cases, it will be noted, involved as elements of the crime not merely the intent to defraud but also the element of pecuniary or property loss to the United States.

(2) Pecuniary or Property Loss to the United States

It is well established in the cases that "defrauding" has at least two accepted meanings, and the question to which we now direct ourselves is which of these two accepted meanings is to be accorded to "defrauding" as used in clause 1 of Section 590 (a).

The usual and primary meaning of defrauding is cheating the government out of property or money (*United States* v. *Cohn,* 270 U. S. 339, 346-47; *Hammerschmidt* v. *United States,* 265 U. S. 185, 188). In statutes where it is apparent from the context or otherwise that more was intended, defrauding has been held to have a secondary and broader meaning of interfering with or obstructing lawful governmental functions by dishonest means (*Hammerschmidt* v. *United States, supra; U. S.* v. *Keitel,* 211 U. S. 370, 393; *Haas* v. *Henkel,* 216 U. S. 462, 479-480; *United States* v. *Curley,* 122 F. 738, *cert. denied* 195 U. S. 678; *Curley* v. *United States,* 130 F. 1, *cert. denied* 195 U. S. 678).

In cases construing the word "defraud" in the general conspiracy statute (*supra,* § 37 of the Penal Code) the courts have uniformly held that "defraud" in that statute is to be given its secondary and broader meaning "which

must result from the words 'in any manner or for any purpose' by which the word 'defraud' is accompanied in the statute" (*United States* v. *Keitel, supra,* at 393; *Hammerschmidt* v. *United States, supra; Haas* v. *Henkel, supra; United States* v. *Curley, supra, Curley* v. *United States, supra.* See Appendix A, p. 13).

On the other hand, in statutes where neither the language nor the context warrants an extension of the term "defrauding" to a secondary and broader meaning, the courts have held that defrauding is to be construed in its primary sense of cheating the government out of property or money. Thus, in *United States* v. *Cohn, supra,* the Court in distinguishing "defrauding" as used in Section 35 of the Criminal Code (U. S. C. A. Title 18, § 80 prior to the 1934 amendment, Appendix A, p. 11) from its use in the general conspiracy statute, held:

> "It is contended by the United States that, by analogy to the decisions in *Haas* v. *Henkel,* 216 U. S. 462, 479, 54 L. ed. 569, 577, 30 Sup. Ct. Rep. 249, 17 Ann Cas. 112 and *Hammerschmidt* v. *U. S.,* 265 U. S. 182, 188, 68 L. ed. 968, 970, 44 Sup. Ct. Rep. 511 and other cases involving the construction of Sec. 37 of the Penal Code relating to conspiracies to defraud the United States, the word "defrauding" in the present statute should be construed as being used not merely in its primary sense of cheating the government out of property or money, but also in the secondary sense of interfering with or obstructing one of its lawful governmental functions by deceitful and fraudulent means. The language of the two statutes is, however, so essentially different as to destroy the weight of the supposed analogy. Section 37, by its specific terms, extends broadly to every conspiracy "to defraud the

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> United States in any manner and for any purpose," with no words of limitation whatsoever, and no limitation that can be implied from the context. Section 35, on the other hand has no words extending the meaning of the word 'defrauding' beyond its usual and primary sense. On the contrary it is used in connection with the words 'cheating or swindling', indicating that it is to be construed in the manner in which those words are 'ordinarily used as relating to the fraudulent causing of pecuniary or property loss.' And this meaning is emphasized by other provisions of the section in which the word 'defraud' is used in reference to the obtaining of money or other property from the government by false claims, vouchers, and the like; and by the context of the entire section, which deals with the wrongful obtaining of money and other property of the government, with no reference to the impairment or obstruction of its governmental functions." [270 U. S., 346-7.]

Applying these criteria to the term "defrauding" in clause 1 of § 590(a), it is apparent that the "defrauding" in this statute is limited to its primary sense of cheating the government out of property or money. There are no words extending the meaning of the word beyond this primary sense. It is true that the words "whether by conspiracy or not, and in any manner" are used in connection with "defrauding", but these relate to devices and methods of defrauding and not to its scope. The case would be different, if, as in the general conspiracy statute, the words "or for any purpose" were also employed. To defraud the United States in any manner or for any purpose would encompass the broadest scope of fraud, as the courts have indicated in the case under the conspiracy statute. Had Con-

gress in enacting clause 1 of Sec. 590(a) intended to extend the meaning of defrauding beyond its usual and primary sense, it could easily have done so by broadening the language to read "defrauding, whether by conspiracy or not, in any manner, or for any purpose," and this would have included interference with deceptive practices with lawful functions of the government. The failure to do so indicates a contrary intent.

Moreover, other sections and the entire context of the Contract Settlement Act and Surplus Property Acts of 1944, of which clause 1 of § 590(a) is a part, emphasize that "defrauding" in that clause is limited to its primary meaning. Thus, the Declaration of Policy of the Contract Settlement Act of 1944, *supra,* states five objectives, all of which concern property or pecuniary matters with which the United States is directly concerned, and, as its sixth and last objective, declares the purpose of the Act to be "to use all practicable methods *compatible with the foregoing objectives* to prevent improper payments and *to detect and prosecute fraud.*" (*Supra, U. S. C. A. Title* 41, § 101(a)-(f) (italics supplied)). Other sections of the Act relating to fraud uniformly use the word "fraud" in its primary sense, in reference to obtaining money or property from the government in connection with war contracts [Ibid. §§ 107, 115(a), (b), 116(a), (b), 118(d), (e), 119(b), (c), (d), Appendix A, pp. 6-10].

Section 119(b) (Clause 1 of Section 590(a)) is one of three interrelated sections which together make up an integrated scheme to detect and prosecute such frauds. Section 119(c) provides for civil remedies for those who make false fraudulent or fictitious claims or the like or who en-

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gage in deceitful practices for the purpose of securing benefit, payment or other pecuniary values from the United States in connection with war contracts. Section 119(d) makes U. S. C. Title 18, § 80 applicable, with its criminal sanctions, to any statement, representation, bill, receipt and the like make, caused to be made or used *for any purpose under this Chapter* (italics supplied)—i.e. for any purpose having to do with war contracts and involving property or pecuniary loss to the United States. Finally, Sec. 119(b) suspends the running of the statute of limitations in offenses involving defrauding or attempting to defraud the United States, i.e. in its primary sense of causing the United States pecuniary or property loss. (Appendix A, pp. 9-10).

The Surplus Property Act of 1944, *supra,* states in its Declaration of Policy objectives which relate to pecuniary and property matters in which the United States is directly concerned. (U. S. C. A. Title 50. App. § 1611.) Other sections of that Act relating to fraud uniformly use the word "fraud" in its primary sense as relating to obtaining money or property from the government in connection with surplus property. (Ibid. § 1635 (a)-(d). Appendix A, pp. 10-11.) The enactment of clause 1 of § 590(a) in the context of the Contract Settlement and Surplus Property Acts of 1944, in a setting of payments, settlements, financing, disposal and other pecuniary values, confirm the conclusion that the "defrauding" involved is used in its primary sense.

If there remains any ambiguity as to the meaning of defrauding in clause 1 of § 590(a), that ambiguity may be and is resolved by reference to its legislative history. *Harrison* v. *Northern Trust Co.,* 317 U. S. 476, 479; *U. S.* v. *American Trucking Association,* 310 U. S. 534, 542-44.

In reporting out H.R. 6484, which became the Act of August 24, 1942 and was incorporated, as we have seen, without essential change in the Contract Settlement and Surplus Property Act of 1944 and thus became the first clause of the present § 590(a), both the House and Senate Committees on the Judiciary left no doubt that the bill was aimed at suspending the running of the statute of limitations as to offenses against the laws of the United States involving defrauding or attempting to defraud the United States in connection with war contracts let by government agencies, independent establishments and government owned or government controlled corporations for materials and equipment and necessarily involving pecuniary or property loss, actual or attempted, to the United States.[11a]

The Senate and House Reports demonstrate that the necessity for such suspension arose out of the gigantic war program, involving the expenditure by the government of huge sums of money in war contracts for materials and equipment, the difficulty of discovering frauds in connection with these expenditures, and the necessary preoccupation of the law enforcement branch of the government with the enforcement of other laws, which prevented the investigation, discovery and prosecution of this type of fraud within the normal period of limitations. The legislative history of the Act of August 24, 1942 is searched in vain to find any intent to suspend the statute of limitations as to offenses under the second clause of Section 80, as amended, such as those charged in the first nine counts of

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[11a]H. Rept. No. 2051; S. Rept. No. 1544 to accompany H. R. 6484. Appellant's Appendix A 96. See also Debate on H. R. 6484 in Senate, 77th Congress, 2nd Session, 88 Cong. Rec. 6160, July 15, 1942.

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the indictment in the case at bar which are entirely unrelated to war contracts and do not involve pecuniary or property loss to the government.

When the Act of August 24, 1942 was amended by the Contract Settlement Act of 1944 and the Surplus Property Act of 1944, thus becoming clause 1 of Section 590(a), the Suspension Act, the essential wording of the 1942 Act was retained. The effect of the 1944 amendments can be succinctly stated in the language of the trial court:

> "Section 19 (b) of the Contract Settlement Act . . . merely amended the 1942 Act by enlarging it specifically to include any offense under the Contract Settlement Act and by extending the time for the suspension of the statutes of limitation. Section 28 of the Surplus Property Act of 1944 . . . again amended the 1942 Act by making it applicable to a further class of offenses, those under the Surplus Property Act." (R.28)

Nothing in the legislative history or statutory context of those Acts, dealing as they do with war contracts and property, indicated any intention to alter the plain meaning of the Suspension Act as one relating to war contracts for material and equipment, which necessarily involves pecuniary or property loss to the United States.

In *United States* v. *Raphael*, Kennedy, *J.*, U. S. District Court, Eastern District of New York, March 17, 1947, Memorandum Opinion, unreported but quoted in full in Appellee's Brief in the court below, Appellee's Appendix pp. 88-92, where the issue of the applicability of the Suspension Act was squarely presented, the statute (U. S. C. Title 12, § 1731-a of the Banking law) under which the indictment was laid denounced as a crime the conduct of

any person who "for the purpose of obtaining any loan or advance or credit . . . with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Authority for insurance . . . causes to be made any statement, knowing the same to be false." Defendant moved to dismiss the indictment on the ground that prosecution was barred by the statue of limitations. The government invoked the Suspension Act on the ground that false statements for the purpose of inducing the government to insure loans constitutes a defrauding and an interference with governmental functions because the government would have to pay the losses consequent upon the fraudulent conduct of the defendant.

The court denied the motion to dismiss and held the Suspension Act applicable. The Court stated that the clause must be given "the same strict construction that its analogue received in the *Noveck, McElwain,* and *Scharton* cases." It held that fraud was an essential ingredient of U. S. C. Title 18, Sec. 1731-a, not merely an incident or purpose of it.

In that case, the language of the statute defining the offenses spells out the requisite intent and unequivocally refers to a defrauding of the United States in the primary meaning of that term.

It is significant to point out that in all cases under the analogous 1921 and 1926 provisos, the element of pecuniary or property loss to the United States was a necessary prerequisite for the application of the six year period of limitations.[12] Where such loss was not involved as an essen-

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[12]See *Bailey* v. *United States, supra; Evans* v. *United States, supra; Weinhandler* v. *United States, supra; Falter* v. *United States supra; Miller* v. *United States, supra;* In re *Doyle, supra.*

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tial ingredient of the crime, the three year statute of limitations was held to bar prosecution.[13] No case has been found[14] in which the statute of limitations was extended under the 1921 or 1926 provisos or suspended under the Suspension Act, (except *United States* v. *Gottfried,* 165 F. 2d 462, cert. denied 304 U. S. 586 which we believe is wrong for the reasons discussed in subsection D. below) unless "defrauding" in the statute defining the offenses was limited to its primary sense and necessarily involved pecuniary or property loss to the United States.

In the light of the language of Suspension Act, its context with other sections in the setting of the Contract Settlement and Surplus Property Acts of 1944, its legislative history of the clause, the decision in the *Raphael* case, and the requirements of pecuniary or property loss to the United States in decisions under the analogous 1921 and 1926 provisos, we submit that the Suspension Act employs "defrauding" in its primary sense of cheating the government out of property or money and the Suspension Act is therefore applicable only where defrauding in this primary sense is an essential ingredient under the statute defining the offense.

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[13]*U. S.* v. *Noveck, supra,* perjury, 1921 proviso *held* inapplicable; *contra, U. S.* v. *Dunten,* 4 F. (2d) 616, perjury in making final proof under a homestead entry of public land. *U. S.* v. *Scharton, supra,* wilful attempt to evade and defeat by false statements, 1926 proviso *held* inapplicable. In this last case, the Court pointed out that there are numerous statutes making intent to defraud an element of a specified offense against the revenue laws, and referred to U. S. C. Title 26, Secs. 261, 306, 316, 555, 667, 775, 843, 1180, 1181, 1184, 1118 (U.S.C.A. Title 26, Secs. 2806, 2833, 2841, 2308, 2309, 2656, 2657, 2161, 2180, 1823, 3321, 3320, 3324). These sections, besides embodying the requisite intent to defraud, also employ defrauding in its primary meaning.

[14]*U. S.* v. *Dunten, supra,* is apparently overruled by *U. S.* v. *Noveck, supra.*

B. Neither the Intent to Defraud Nor Pecuniary or Property Loss to the United States is An Essential Ingredient of the Offenses Charged in the Indictment under the False Claims Act.

(1) THE INTENT TO DEFRAUD THE UNITED STATES

Prior to 1934, the False Claims Act read:

> "Whoever . . . for the purpose and with the intent of cheating and swindling or defrauding the government of the United States shall knowingly and wilfully . . . make or cause to be made any false or fraudulent statements or representations." (Appendix A. p. 1)

In *United States* v. *Cohn, supra,* an indictment under this statute charged that the defendant, for the purpose and with the intent of defrauding the government, had wrongfully obtained non-dutiable merchandise from the Collector of Customs by knowingly causing false and fraudulent statements to be made. This Court sustained demurrer to the indictment on the ground that the acts charged were not a defrauding of the United States within the meaning of the Statute. The Court held that "defrauding" was to be construed in its primary sense, in the manner in which the word is ordinarily used, as relating to the fraudulent causing of pecuniary or property loss and that the United States was not defrauded by the acts alleged in the indictment.

Largely as a result of this decision, the statute was amended by the Act of June 18, 1934 to its present form (See Appendix A, p. 1). The legislative history of the 1934 amendment shows that while proposed legislation first sought to include "with intent to defraud" and, later, to retain "defrauding" as an essential element in the offense,

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the amendment as finally enacted and now in effect, rejected this attempt and framed the statute on a different basis. This legislative history is summarized in *United States* v. *Gilliland*, 312 U. S. 86, 93-4, where the application of the second clause of the amended statute was sustained as to counts of an indictment charging false and fraudulent statements on a matter within the jurisdiction of a department and agency of the United States, where no "intent to defraud" was alleged and pecuniary or property loss to the United States was not involved.

> "The amendment eliminated the words 'cheating and swindling' and broadened the provision so as to leave no adequate basis for the limited construction which had previously obtained. The statute was made to embrace false and fraudulent statements or representations when these were knowingly and wilfully used in documents or affidavits 'in any matter within the jurisdiction of any department or agency of the United States.' In this, there was no restriction to cases involving pecuniary or property loss to the government. The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described. . . .
>
> "Legislation had been sought by the Secretary of the Interior to aid the enforcement of laws relating to the functions of the Department of the Interior and, in particular, to the enforcement of regulations under Sec. 9 (c) of the National Industrial Recovery Act of [June 16] 1933 with respect to the transportation of 'hot oil.' The Secretary's effort was due, as he stated, to the lack of a law under which prosecutions might be had 'for the presentation of false papers.' The bill which was

passed by Congress, however, was amended in its final stages so as to require 'intent to defraud the United States.'[15] This bill was returned by the President without his approval for the reason that the offense as defined was covered by existing law which provided for more severe punishment than that proposed by the bill. 78 Congressional Record, pt, 6 p 6778 (73rd Cong. 2nd ses.) Another measure was then proposed by the Secretary of the Interior which would obviate these objections and accomplish the purpose of reaching the presentation of false papers in relation to 'hot oil'. A bill was then passed and approved which included, with other amendments of Sec. 35, the provision now before us, omitting the limiting words which had been deemed to make the former provision applicable only to cases where pecuniary or property loss to the government had been cause.[16] The report of the Judiciary Committee of the Senate stated that the

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[15]For the text of this bill (H. R. 8046) and the Secretary's letter, see Appendix A, pp. 15, 19. This bill eliminated the words "cheating and swindling or defrauding" and substituted the words "with intent to defraud."

In reporting out this bill the Committee of Judiciary of the House stated "the rights of the accused are protected by the provision that the act must be committed *wilfully and knowingly and with intent to defraud the United States.*" (H. Rept. No. 829 to accompany H. R. 8046)

[16]The bill (H. R. 8912) which was resubmitted after the President's veto, contained the original language of clause 2 of Section 80, "with the intent of cheating and swindling or defrauding the government of the United States" (H. Rept. No. 1463, May 3, 1934, to accompany H. R. 8912) and passed the House in this form (78 Cong. Rec. pt. 6, pp. 8136-37). This bill, however, was amended in the Senate (S. Rept. 1202, May 28, 1934, 78 Cong. Rec. pt. 6, pp. 9790, 11270, 73 Cong. 2nd sess.) and, as finally enacted, omitted not only "cheating and swindling" but also "or defrauding the government of the United States". (ibid p. 11270)

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> amendment in question had been proposed by the Department of the Interior with the purpose 'of reaching a large number of cases involving the shipment of "hot" oil, where false papers are presented in connection therewith.' "

In the light of the construction of the earlier statute in the *Cohn* case (*supra*), the purpose of this amendment to reach false papers, the rejection by the President of the bill as sent to him for signature, and the elimination of the words "with intent to defraud" and "defrauding" from the bill as finally enacted, we submit that, as the Court stated of the perjury statute in the *Noveck* case *supra* the purpose to defraud the United States is not an element of the crime defined by the False Claims Act; it does not affect the charge; it need not be proved and may be rejected as mere surplusage. Indeed, the *Gilliland* case itself (*supra*) is conclusive as to the fact that an offense alleged under the False Claims Act is a distinct offense, complete in itself, and does not involve the intent to defraud the United States as an essential ingredient of the offense. Similar examples are found in the lower court cases, under the False Claims Act [See e.g. *United States* v. *Mellon*, 96 F. (2d) 462, cert. denied 304 U. S. 586; *United States* v. *Presser*, 99 F. (2d) 819; *United States* v. *Goldsmith*, 108 F. (2d) 1917, cert. denied 309 U. S. 678; *Ex parte Berkhoff*, 65 Fed. Supp 976, 979 159 F. (2d) 6; *United States* v. *Zavala*, 139 F. (2d) 830, 831].

The validity of this conclusion is confirmed by several decisions holding that the intent to defraud the United States is not an essential element, under false and fraudulent statement statutes, which in all essential respects are identical with the False Claims Act.

Thus in *United States* v. *Van Leuven*, 62 F. 69, 70, the statute involved penalized those who

> "knowingly or wilfully make or aid or assist in the making or in any way procures the making or presentation of any false or fraudulent affidavit, declaration, certificate, voucher, or paper or writing purporting to be such, concerning any claim for pension or payment thereof or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions or of the Secretary of the Interior" [R. S. §4746, July 7, 1898 c. 578, 30 Stat. 718 (now superseded, see 18 U. S. C. A. §81 R. S. §§4746, 4766; August 17, 1912 c. 301, §1, 37 Stat. 312; July 3, 1930, c. 863, §2 46 Stat. 1016)].

It will be noted that except for its limitation to the Secretary of the Interior and the Commissioner of Pensions (with respect to pensions and bounty lands, see *United States* v. *Keitel, supra,* and possibly to writings) the language of this Act (now superseded) is substantially the same as that of the False Claims Act, upon which the indictment herein is grounded, i.e., both penalize the making of false or fraudulent statements and neither includes the words "defrauding" or "with intent to defraud" the United States. In overruling a demurrer to an indictment under this statute, it was held that

> " if the indictment was based upon the provisions of Sections 5418, 5421, or 5479 of the Revised Statutes (U. S. C. Title 18, §§ 72, 73), the failure to aver the intent or purpose of defrauding the United States would probably be fatal to the indictment as these sections are alike in the provision that the acts named therein must be done with the purpose of defrauding the United States; and under the ruling of the Su-

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preme Court of the United States in U. S. v. Staats, 8 How. 40-45, the purpose to defraud the United States is one of the essentials in the definition of the crime. I do not understand, however, that the indictment in question is based upon either one of these sections, but upon the provisions of Section 4746 which declares that 'every person who knowingly or wilfully in any wise procures the making or presentation of any false or fraudulent affidavit concerning any claim for pension or payment thereof or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions . . . shall be punished, etc.' The gist of this offense is not in an effort to defraud the United States but it consists in knowingly procuring the making of a false or fraudulent affidavit concerning a claim for pension or payment thereof, or any other matter within the jurisdiction of the Commissioner of Pensions. The statute does not in terms make an intent or purpose to defraud the United States an element in the offense and the facts necessary to fully make out the crime can averred without charging the intent to defraud the United States" [See also *United States* v. *Hansee*, 79 F. 303].

In the light of the criteria established by the Supreme Court in the *Gilliland, Noveck* and *Scharton* cases *supra,* we submit that defrauding is not an essential element of the offense as defined by the False Claims Act. To import that concept into False Claims Act from the Suspension Act would be to create a new and separate offense, where such a purpose is negatived by the legislative history and the plain words of the statute. The crimes alleged in the first nine counts of the indictment are not denominated frauds by the False Claims Act, any more than the false swearing

in the *Noveck* case was denominated a fraud by the perjury statute; and fraud is no more implicit in these counts than fraud was implicit in the false statements in the *Scharton* case.

(2) Pecuniary or Property Loss to the United States.

As already indicated the False Claims Act, prior to the 1934 amendment, required the intent to defraud the United States, and pecuniary or property loss to the United States, actual or attempted, as necessary ingredients of the offense. In the 1934 amendment these requirements were deleted, and in the *Gilliland* case, *supra*, an indictment was sustained charging false or fraudulent statements, without averring the purpose to defraud the United States. In discussing the effect of the 1934 amendment, on this point, the Court said "In this there was no restriction to cases involving pecuniary or property loss to the government. The amendment indicated the Congressional intent to protect the authorized functions of governmental departments and agencies which might result from the deceptive practices described" (*ibid* 93). The point was put succinctly in *United States* v. *Mellon, supra,* sustaining a judgment under the second clause of §80 as amended, against the objection that the indictment was insufficient on the theory that there can be no violation of §80 without pecuniary loss to the government. As a result of the amendment, the court held, "the element of pecuniary loss to the government is no longer an essential ingredient of the crime" (96 F. (2d), 463. *United States* v. *Presser, supra. United States* v. *Rohleder* 157 F. (2d) 126).

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In the case at bar, none of the eleven counts alleges any pecuniary loss to the government as a result of the false or fraudulent statements charged. Petitioner was appointed to a temporary position as a government employee in March 1942, subject to character and fitness investigation. He served in this capacity until inducted in the armed forces, and after his honorable discharge, until November 15, 1946 (R. 171-6, 181, 218, Tr. 103-109, 286, 1117). There is no allegation that he received money without such service or that he cheated the government out of property or money. In passing on the motion to dismiss the indictment, the trial court agreed, holding that False Claims Act is not limited to frauds involving pecuniary or property loss to the government and that the offense charged "amounts to a deceptive practice, which as Justice Hughes stated in *U. S.* v. *Gilliland, supra,* was exactly what was encompassed" (R. 29).

At the trial, the government's theory of the case was that pecuniary or property loss to the United States was immaterial. It introduced no evidence that the Government had suffered any such loss and resisted, as irrelevant and collateral, efforts of petitioner to introduce evidence that he had received no compensation from the government between November 15, 1946, when petitioner asserts that he resigned from government service, and December 20, 1946, when the Government claims he was removed (Defendant's Exhibit 1; App. 57, 63-64, 72).

Finally, the trial court charged the jury that "pecuniary or monetary loss to the government is not an element of the offense, so that the government is not required to prove that the government suffered a pecuniary loss in connection with the offense here charged" (R. 41).

The proposition is, therefore, supported by authority and conceded by the government that, in this case, under the False Claims Act, pecuniary or property loss is not an essential element of the offense charged in the first nine counts of the indictment.

We submit that the Suspension Act is inapplicable to suspend the running of the statute of limitations on the first nine counts of the indictment, because the Suspension Act applies only where "defrauding" is an essential ingredient of the offense charged, and such defrauding necessarily involves the intent to defraud and pecuniary or property loss to the United States. Under the False Claims Act, however, "defrauding" is not an essential element of the crimes charged in the first nine counts of the indictment, because they do not require the intent to defraud or pecuniary or property loss to the United States as essential elements of the crime. Since the offenses charged in the first nine counts of the indictment occurred more than three years prior to the indictment, prosecution is barred by the three year statute of limitations of U. S. C. Title 18, Sec. 582.

C. The Opinion of the Court Below

The court below held that the Suspension Act did not apply to the offenses involved in the first nine counts of this indictment under the False Claims Act. In reaching this result, it held that under the *Noveck* and kindred cases, construing the 1921 and 1926 provisos, "The Supreme Court has clearly said that (1) a statute identical in pertinent part with the Suspension Act does not apply to offenses of which defrauding the United States in a pecuniary way was not an essential ingredient", and, under the *Gilliland* case, (2) "that such defrauding of the United States is not an

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essential ingredient of offenses under the False Claims statute" (R. 275). It pointed out that the government had admitted (1) that the 1921 and 1926 provisos are "in all essential respects identical with" the present Suspension Act, (2) that the *Noveck* and kindred cases were decided in accordance with the principle that "in order to be affected by the suspension statute 'defrauding or an attempt to defraud the United States' must be *an ingredient* under the statute defining the offense" (R. 275), and (3) that the False Claims Act "does not require the government to establish proof of (a) intent to defraud or (b) pecuniary or property loss to the United States" (R. 275-276). It rejected the government's contention, under these admissions, that the 1934 amendment to the False Claims Act had merely varied its form and not its substance, that the Act retained after its amendment "all its essential fraud characteristics" and that a false statement made in a matter within the jurisdiction of an agency of the United States "'*necessarily* (italics in Government brief) involves a fraud.'" (R. 275-276).

> "The difficulty with the foregoing contention is that it ignores the plain rulings in Noveck and kindred cases. Those cases involved false statements, under oath. The offenses tended to obstruct, by dishonest means, the operation of a department of the Government. The Court held that the Suspension Act (actually an identical predecessor) does not apply to such offenses. So that even if the False Claims Act does involve the sort of fraud the Government says it does, the Suspension Act does not apply; the rulings in the Noveck and similar cases related precisely to that same sort of fraud. . . . It follows that we are of the opinion that the first nine counts of this indictment were barred by the statute of lim-

itations and that the defendant's motion that they be dismissed should have been granted" (R. 276).

It should be noted that the court below appears to have placed its decision on the ground that "defrauding" as used in the Suspension Act requires that pecuniary loss must be an essential element in the underlying statute defining the offense, and that the False Claims Act is a statute in which such loss is not an essential element. This is a narrower ground than warranted by the legislative history and applicable decisions of this Court relating to the Suspension Act and the False Claims Act. As we have pointed out above, the Suspension Act is not applicable to suspend the running of the statute of limitations unless the offense to which its application is sought also involves the intent to defraud as an essential ingredient, and the False Claims Act is a statute in which neither intent to defraud nor pecuniary loss to the government is an essential ingredient. Despite this limitation, we submit that the result reached by the court below is clearly correct.

D. The Government's Contentions

The Government's primary contention is that the wilful making of false statements to the United States, as charged in the first nine counts of the indictment under the False Claims Act, involve a "defrauding" of the United States, within the meaning of "defrauding", as used in the Suspension Act (Gov't. Brief, pp. 19, 27-28).

1. It seeks to support this contention by asserting that the plain words of the Suspension Act and of the False Claims Act are "almost identical" (*ibid.* 27); that the Suspension Act is not limited to defrauding which results in

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pecuniary loss because it refers, "in the broadest language imaginable" to defrauding the United States "in any manner"; that the False Claims Act equally applies to false statements, without limitations of pecuniary loss, under the decision of this Court in the *Gilliland* case; and that both statutes reach offenses involving any manner of fraud on the government (*ibid.* 28-29).

These assertions ignore the plain fact that "defrauding", which appears in the Suspension Act, was deliberately and intentionally eliminated by amendment from the False Claims Act to avoid the limitation of pecuniary loss which this Court in *United States* v. *Cohn, supra,* held the word "defrauding", in its ordinary meaning, required. The word "defrauding" which is a requirement of the Suspension Act now nowhere appears in the False Claims Act. The plain words of the two statutes are, therefore, not "almost identical"; they are critically different. Nor is the use of the words "in any manner", as applied to "defrauding" in the Suspension Act, the broadest language imaginable. As we have pointed out, when Congress wished to reach offenses involving the broadest scope of fraud on the government, as in the general conspiracy statute, it used apt language "in any manner *and for any purpose*" which eliminated the requirement of pecuniary loss and broadened the construction of defrauding to include interference with lawful governmental functions by dishonest means (*United States* v. *Keitel,* 211 U. S. 370, 393). The failure to employ "for any purpose" in the Suspension Act indicates that Congress did not intend to use "the broadest imaginable language" but meant to limit "defrauding" to its primary and ordinary sense of causing pecuniary loss to the government. This conclusion is amply supported by the adoption in the present

Suspension Act of the identical language of the 1921 and 1926 provisos, after they had been construed by this Court in the *Noveck* and *Scharton* cases and in numerous lower court cases without exception, to limit the application of those provisos to statutes in which purpose or intent to defraud in its primary sense was an essential element. It is also fully supported by the legislative history of the present Suspension Act in its purpose to reach fraud in connection with war contracts and in its setting as a part of the Contract Settlement and Surplus Property Acts, with their limitation to pecuniary and property values.

2. The Government next says that the wilful making of false statements to the United States under the False Claims Act is a fraud on the United States within the concept of fraud recognized in *Haas* v. *Henkel,* 216 U. S. 462, 479-480; *Hammerschmidt* v. *United States,* 265 U. S. 182, 188; *United States* v. *Gilliland, supra;* and *United States* v. *Bayer,* 331 U. S. 532, 533 (Gov't. Brief 19-20, 28, 30, 41-42). It cites *United States* v. *Gottfried,* 165 F. 2d 360, 367-368, cert. denied 333 U. S. 860, and *United States* v. *Agnew,* 6 F. R. D. 566 (E. D. Pa.) as cases upholding the application of the present Suspension Act to false statements or false claims under the False Claims Act.

But the *Haas, Hammerschmidt* and *Bayer* cases involve offenses under the general conspiracy statute only, where the crime is conspiracy to defraud the United States in any manner *and for any purpose.* For reasons already indicated, the construction of the word "defraud" in those cases can have no proper application to the word "defrauding" in the Suspension Act which does not include the broadening words "or for any purpose" or to false state-

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ments under the False Claims Act from which the narrowing words "defrauding" and "intent to defraud" have been eliminated.

With all deference, we submit that the decision in *United States* v. *Gottfried* rests upon the same misapplication of the doctrine of the conspiracy cases. In that case, defendants were indicted in two counts under the False Claims Act for having fraudulently overstated and certified to the O.P.A. their sugar consumption for 1941. A second indictment, consolidated with the above for trial, charged one of the defendants in the first case and two additional defendants, with having conspired, together with a fourth individual, to defraud the United States of the faithful services of one of the defendants, an O.P.A. investigator, in violation of 18 U. S. C. Section 88. The indictment under the False Claims Act was filed more than three years after the crime had been committed. The court rejected the argument that defrauding the United States, as used in the Suspension Act, should be confined to frauds of those who contracted with the United States or supplied it with materials and that it does not include interference even though fraudulent which results in no pecuniary loss. It held:

> "Textually, this reasoning has nothing to commend it, except so far as the word 'fraud' may imply pecuniary loss; and whatever may be said as a new matter for so circumscribing that word, *it has been the law, at least since 1910, that in the statute* [20] *under which this indictment was drawn, 'fraud' includes any conduct 'calculated to obstruct or impair its (the United States)' 'efficiency and*

[20]Section 80, 18 U. S. C. A.

> *destroy the value of its operations and reports.*"[21] We see no reason for reading the words 'defrauding the United States' in the statute of limitations now in question less comprehensively; certainly there was not enough ground for that in the debates of Congress. Besides, the purpose of the amendment was not to let crimes pass unpunished which had been committed in the hurly-burly of war, an overriding motive which perfectly fits the situation at bar."

[21] *Haas* v. *Henkel*, 216 U. S. 462, 479, 30 S. Ct. 249, 254, 54 L. Ed. 569, 17 Ann. Cas. 1112.

It is apparent that the court applied the doctrine of the conspiracy cases as exemplified in *Haas* v. *Henkel*, to the interpretation of the ord "defrauding" as used in the Suspension Act. The court is demonstrably in error in citing *Haas* v. *Henkel* as authority for the statement that it has been the law since 1910 that fraud in the False Claims Act has a meaning not restricted to pecuniary loss. The pertinent sections of the False Claims Act here involved were not enacted until 1918 (Act of October 23, 1918 c. 194, 40 Stat. 1015); and until 1934, these sections were limited in application to false statements involving pecuniary or property loss to the United States. See *United States* v. *Cohn, supra, United States* v. *Gilliland, supra. Haas* v. *Henkel* involved the general conspiracy statute (18 U. S. C. Section 88) and did not purport to construe the sections of the False Claims Act under which the indictment was drawn. The error is of no consequence, with respect to the present construction of the False Claims Act, since the 1934 amendment eliminated the requirement of pecuniary loss and broadened the statute so that it now punishes deceptive practices in respect to authorized functions of

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government departments, without such a limitation. The error is of great consequence, however, in connection with the construction of "defrauding" as employed in the Suspension Act. The court does not refer to construction by this Court of "defrauding" in the 1921 and 1926 provisos in the *Noveck* and kindred cases, which limited the applicability of those identical predecessors of the Suspension Act to offenses in which the intent to defraud in a pecuniary sense was an essential element. It does not refer to the reenactment in the present Suspension Act of the pertinent identical language of the 1921 and 1926 provisos, after such restrictive interpretation by this Court. It does not refer to the House and Senate Committee Reports on the Act of August 24, 1942 which specifically referred to the 1921 proviso and indicated that the present Suspension Act was designed to fulfill the same purpose, in connection with the huge governmental expenditures of money in the last war. Instead, it relies in part on the fact that there was not enough ground in the Congressional debates to limit the Suspension Act in the manner contended for, particularly in the light of the general purpose of the suspension. It bases its holding primarily on the construction of "defrauding" in the general conspiracy statute, which includes the words "or for any purpose" and carries over that construction to the Suspension Act, in which those words of broadening scope are lacking. We submit that in the light of all the factors mentioned above, which the court has ignored, such a construction of the Suspension Act is wholly unwarranted. Nor does the denial of a writ of certiorari by this Court import any expression of opinion on the merits of that construction. *United States* v. *Carver*, 260 U. S. 42; *Sunal* v. *Large*, 332 U. S. 174, 181.

The *Agnew* case, *supra*, cited by the government, furnishes little support for its contention. There, the defendant was charged under Section 80 with having knowingly prepared false payroll statements over a period of approximately three years by padding the payroll to include specified names and accounts paid, when in fact no such employees existed and no such amounts were paid, the statements having been used for invoices on which payment was made by the War Shipping Administration and for tax returns forms to the Treasury Department and the Social Security Board. Defendant moved to dismiss on the ground of the statute of limitations. The Court stated, citing the *Weinhandler* case, *supra*, that clause 1 of Section 590(a) was applicable, since "fraud is made an essential element of the statute" (Section 80). The Court, however, held that the statute of limitations was suspended by clause 2 of Section 590(a), since it was undenied that the offense charged "was committed in connection with the performance (and) payment for . . . of (a) subcontract . . . which is connected with or related to the prosecution of the . . . war". The Court also cited Section 119(d) of the Contract Settlement Act of 1944 (Appendix A, p. 10) which specifically applies Section 80 to offenses under the Contract Settlement Act.

Thus, the holding of the case is that clause 2 of Section 590(a) is applicable to the prosecution, and the statement as to the applicability of clause 1 of Section 590(a) is not necessary to support the decision. In the case at bar, clause 2 of Section 590(a) is not claimed to be applicable and the case in no way relates to war contracts, or to the subject matter of the offenses to which Section 80 is made applicable by Section 19(d) of the Contract Settlement Act of 1944. Moreover, it appears from the decision that the offense

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charged may have involved other clauses of Section 80 than those involved in the case at bar, and, most important, related to false or fraudulent statements inolving pecuniary loss to the United States in connection with war contracts. The *Agnew* case, therefore, sounds in embezzlement, like the *Weinhandler* case, *supra;* the case at bar is a simple false or fraudulent statement case, like the perjury statute in the *Noveck* case. The *Agnew* decision, we submit, is not in point.

The Government's citation of the *Gilliland* case, in this respect, is completely inapposite. (Gov't. Brief, pp. 19, 29). Contrary to the Government's contention, this Court did not at any place in its opinion in the *Gilliland* case term the wilful making of false statements to the United States a "fraud" or a "defrauding" of the United States, nor can any inference to that effect be drawn from any part of the opinion, in view of the effect which it gave to the 1934 amendment, as completely eliminating "defrauding" and the "intent to defraud" from the statute.

3. The Government further seeks support in the legislative history of the Suspension Act for its contention that "defrauding" as used therein is applicable to the False Claims Act, which it terms a "fraud" statute. (Gov't. Brief, pp. 30, 37). It asserts that the addition of clauses "(2)" and "(3)" to the Suspension Act specifically relating to offenses in connection with the procurement and disposition of war materials demonstrates that clause "(1)" was intended by Congress to include fraud offenses which were not war frauds, i. e. frauds in the procurement and disposition of war material. (*Ibid.*, pp. 35-36). Such a contention, of course, lends no support to a broader interpretation

of "defrauding" in the Suspension Act than is warranted by all the factors which we have noted, nor is there anything in the legislative history of clauses "(2)" and "(3)" which alters the basis for the restrictive interpretation of clause "(1)". In the court below, the government cited with approval *United States* v. *Raphael, supra,* where clause "(1)" was held applicable to a prosecution under 12 U. S. C. Section 1731(a) of the banking law for false statements made in January 1940 to the Federal Housing Administration.[17] These statements obviously did not relate to war frauds, yet the court there held that clause "(1)" must be given "the same strict construction that its analogue received in the *Noveck, McElwain* and *Scharton* cases."

The government also urges that the specific reference to the False Claims Act in Section 119(d) of the Contract Settlement Act demonstrates that Congress intended this important substantive provision to have the benefit of the suspension of the statute of limitations provided in Section 119(b). (Gov't. Brief, p. 36). But Section 119(d) merely says that the False Claims Act shall apply to false statements, claims or the like made or used for any purpose under the Contract Settlement Act or under any regulations pursuant to that Act. There is nothing in Section 119(b) or (d) of the Contract Settlement Act which broadens the meaning of "defrauding", as used in the Suspension Act (Section 590(a), clause 1), or narrows the meaning of the sections of the False Claims Act, here involved, as given in the *Gilliland* case, to bring the two statutes into equivalence. The government argues that there would be no purpose in providing for the suspension of the limitations period if the suspension provisions were not intended to apply to the

[17]Brief for Appellee, pp. 10, 11, 23, 31.

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most important criminal sanction in the act. The short answer to this contention is that clause "(2)" of the Suspension Act provides for such suspension as to any offense committed in connection with the negotiation, procurement, award, performance, payment for, financing, cancellation, or other termination of settlement of any contract related to the prosecution of the present war or disposition of termination inventory by any war contractor or Government agency. The benefit of suspension is thus applied comprehensively to offenses relating to all phases of the Contract Settlement Act, including false statements under the False Claims Act (Section 119(d)). And other sections of the False Claims Act defining offenses of false claims for payment of money, which are not involved in the case at bar, are benefited by the Suspension Act, applied in the manner we suggest. See *United States* v. *Agnew, supra; Evans* v. *United States, supra.* Nothing in the Government's argument requires the application of the Suspension Act to offenses under the pertinent sections of the False Claims Act, which do not involve the intent to defraud and pecuniary or property loss to the United States.

4. The Government challenges the decision of the court below on the ground that it based its decision on the *Noveck, McElwain* and *Scharton* cases, which it regarded as dispositive of the issue, notwithstanding that none of these cases involved a prosecution for making false and fraudulent statements to a Government agency in violation of the False Claims Act (Gov't. Brief, pp. 19, 38). The Government claims that the court below has misread these cases and that neither they, nor any other case interpreting them, has held that the extended period of limitations applied only to offenses in which the Government suffered financial or prop-

erty loss (*ibid* 38). We do not pause to reargue the opinion of the court below on this score, which we regard as correct, but unnecessarily limited in its interpretation of these cases. The Government concedes that the 1921 and 1926 provisos, as interpreted in the *Noveck, McElwain* and *Scharton* cases, were not held applicable in any case to offenses which did not specifically include fraud as one of its elements (*ibid* 40-41). But those cases defined the offense of fraud as requiring the intent to defraud and none of the offenses involved in those cases required either such an intent or pecuniary loss to the Government, and there are no cases to the contrary, except *United States* v. *Dunten*, 4 F. 2d 616 (D. C. D. Oregon 1925) which is overruled by the *Noveck* case (1926). On the other hand, all the cases which have held that the statute of limitations was extended, under the 1921 and 1926 provisos, or suspended under the Suspension Act, except the *Gottfried* case, have involved as essential elements under the statute defining the offenses, both the intent to defraud and pecuniary loss to the United States (*Bailey* v. *United States, supra; Evans* v. *United States, supra; Weinhandler* v. *United States, supra; Falter* v. *United States, supra; Miller* v. *United States, supra; In re Doyle, supra; United States* v. *Raphael, supra, United States* v. *Agnew, supra*). Nothing which the government urges from the decided cases invalidates the holding of the court below or lends any support to the contention that "defrauding" as used in the Suspension Act involves any different requirements for its application than those which this Court defined in the *Noveck, McElwain* and *Scharton* cases.

5. Finally, the Government argues that as a matter of policy, Congress in enacting the Suspension Act must have been aware that the kind of fraud which interferes with the

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lawful functioning of a department of the Government very often carries consequences infinitely more serious than those involved in mere financial loss and that only by attributing to Congress a lack of good judgment is it possible to narrow the Suspension Act in the manner contended for by petitioner (Gov't. Brief, pp. 29-30). In the court below, the Government asked "Is it reasonable to suppose that Congress would have said to the Department of Justice that 'by virtue of the war you may take your time in the investigation, detection and prosecution of frauds of a contractual nature involving pecuniary loss to the Government, but as to all other types of fraud, you will investigate, detect and prosecute as though the country were at peace?' " (Brief for Appellee, pp. 22-23). The judgment of Congress on this score was otherwise expressed and, we submit, for good reason.

Senate Report No. 1544 and House Report No. 2051 (App. A pp. 16-17), which are in pertinent part identical, make it abundantly clear that the reasons for the enactment of the Suspension Act were the difficulty and length of time involved in discovering, investigating and gathering evidence to prosecute frauds in connection with the huge sums of money expended by the Government in war contracts for material and equipment and the necessary preoccupation of the Department of Justice with the prompt enforcement of other laws, particularly those relating to the security of the nation in time of war, which prevented the discovery, investigation and prosecution of this type of war contracts fraud within the three year period of limitation. The present case, if conviction is warranted, represents the type of case, in the latter group, in which, in the contemplation of Congress, the Government should for its own protection have acted with dispatch and within the three year period

of limitation. On the other hand, the prosecution of war contract frauds involves no such pressing problem. As pointed out in the House and Senate Reports, the task of prosecuting war contractors for frauds committed in connection with war contracts is difficult and time consuming. If such prosecutions were required during the war, they might well have interfered with the more immediate problems of the enforcement of laws relating to national security, with which the Department of Justice was busily concerned. Moreover, the prosecution of war contractors for defrauding the government at the time when they are engaged in producing material and equipment for the war effort might have the effect of slowing down war production. Such, at any rate, was the theory behind the policy adopted by the government during the war with respect to the stay of prosecutions under the anti-trust acts. Thus, the distinction which the government in its brief in this case considers unreasonable is one which, as a matter of policy, the government itself adopted during the war. The government's appeal to reason on this score would have been more persuasive if it had asked: "Is it reasonable to suppose that Congress meant the Department of Justice to take its time, as though the country were at peace, in prosecuting war service appointees, employed in war-time agencies, who have lied about their character and fitness for government employment during time of war?" So phrased, the question can be answered in only one way. We submit that the policy and legislative history of the Suspension Act fully justify that answer.

6. In the court below, the Government conceded, and has not denied in this Court, that the False Claims Act does not require allegation or proof of intent to defraud

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or of pecuniary or property loss to the United States. (Gov't. Brief, p. 26, R. 276, Brief for Appellee, pp. 5, 10, ftn. 3, 29). It further concedes, though grudgingly, as it conceded in the court below, the validity of the holding in the *Noveck* and kindred cases, that the identical predecessors of the Suspension Act were not applicable to suspend the running of the statute of limitations, unless the element of defrauding, embodying intent to defraud, was included in the statute defining the offense. (Gov't. Brief, pp. 39, 41, R. 275). These concessions, we submit, are fatal to the Government's case. For, if the intent to defraud and pecuniary loss need not be alleged or proved in an offense under the False Claims Act, they are not elements of the offense. *Hagner* v. *United States,* 285 U. S. 427, 431; *Re Lane,* 135 U. S. 443. Since the Suspension Act applies only where such matters are elements of the offense, it has not suspended the running of the statute of limitations on the first nine counts of the indictment herein.

CONCLUSION

For the foregoing reasons, we respectfully submit that the court below correctly held that the first nine counts of the indictment are barred by the three year statute of limitations (18 U. S. C. Sec. 582).

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APPPENDIX A

1. Statutes Involved

Act of June 18, 1934, c. 587 (48 Stat. 996) as amended by the Act of April 4, 1938 c. 69 (52 Stat. 197) U. S. C. Title 18, § 80. (Criminal Code, section 35 (A).) *Presenting false claims.*

Whoever shall make or cause to be made or present or cause to be presented for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. (Mar. 4, 1909, c. 321, Sec. 35, 35 Stat. 1095; Oct. 23, 1918, c. 194, 40 Stat. 1015; June 18, 1934, c. 587, 48 Stat. 996; April 4, 1938, c. 69, 52 Stat. 197)

Act of October 23, 1918 c. 194 (40 Stat. 1015) U. S. C. Title 18, Sec. 80. (Criminal Code, section 35, amended.) *Presenting false claims; aiding in obtaining payment thereof.*

Whoever, shall make or cause to be made or present or cause to be presented, for payment or approval, to or

by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. (R. S. Sec. 5438; May 30, 1908, c. 235, 35 Stat. 555; Mar. 4, 1909, c. 321, Sec. 35, 35 Stat. 1095; Oct. 23, 1918, c. 194, 40 Stat. 1015)

Act of August 24, 1942 c. 555 § 1 (56 Stat. 747) as amended U. S. C. Title 18, § 590 (a). *Suspension of limitations on offenses involving the defrauding of the United States.*

The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancellation or other termination of settlement, of any contract, subcontract, or purchase order

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which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, or (3) committed in connection with the care and handling and disposal of property under sections 1611-1646 of Appendix to Title 50, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law. Aug. 24, 1942, c. 555, § 1, 56 Stat. 747, as amended July 1, 1944, c. 358, § 19 (b), 58 Stat. 667; Oct. 3, 1944, c. 479, § 28, 58 Stat. 781.

Act of April 13, 1876 c. 56 (19 Stat. 32) as amended by Act of December 27, 1927, c. 6 (45 Stat. 51) U. S. C. Title 18, § 582. *Offenses not capital.*

No person shall be prosecuted, tried or punished for any offense, not capital, except as provided in section 584 of this title, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed. (As amended Dec. 27, 1927, c. 6, 45 Stat. 51)

Act of April 13, 1876 c. 56 (19 Stat. 32) as amended by Act of November 17, 1921, c. 124, (42 Stat. 220) U. S. C. Title 18, Sec. 582. *Offenses not capital.*

No person shall be prosecuted, tried or punished for any offense, not capital, except as provided in section 584 of this title, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed: *Provided,* however, That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by con-

spiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitation shall be six years. This section shall apply to acts, offenses, or transactions where the existing statute of limitations had not yet fully run on November 17, 1921; but the proviso shall not apply to acts, offenses or transactions which on that date were already barred by the provisions of existing laws. (R. S. Sec. 1044; April 13, 1876, c. 56, 19 Stat. 32; Nov. 17, 1921, c. 124; Sec. 1, 42 Stat. 220)

Revenue Act of [February 26,] 1926 c. 27, Sec. 1110 (a) (44 Stat. 114) U. S. C. Supp. V Title 26, Sec. 585.

"That no person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense: *Provided*, That for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, the period of limitation shall be six years, but this proviso shall not apply to acts, offenses, or transactions which were barred by law at the time of the enactment of the Revenue Act of 1924; *Provided further*, That the time during which the person committing the offense is absent from the district wherein the same is committed shall not be taken as any part of the time limited by law for the commencement of such proceedings: *Provided further*, That the provisions of this Act shall not apply to offenses committed prior to its passage: *Provided further*, That where a complaint shall be instituted before a commissioner of the United States within the period above limited, the time shall be extended until the discharge of the grand jury at its next session within the district: And provided further, That this Act shall not apply to offenses committed by officers of the United States." (As amended February 26, 1926, c. 27 Sec. 1110 (a), 44 Stat. 114.)

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Act of August 24, 1942, c. 555 § 1 (56 Stat. 747).

> "The running of any existing statute of limitations applicable to any offense against the laws of the United States, involving defrauding or attempts to defraud the United States whether by conspiracy or not, and in any manner and now indictable under any existing statutes shall be suspended until June 30, 1945 or such earlier time as the Congress by concurrent resolution or the President may designate." (August 24, 1942, c. 555, Secs. 1, 56, Stat. 747)

Contract Settlement Act of 1944. July 1, 1944 c. 358 § 1 et seq. (58 Stat. 649) U. S. C. A. Title 41 § 101 et seq.

OBJECTIVES OF THE ACT

SECTION 101. The Congress hereby declares that the objectives of this Act are—

(a) to facilitate maximum war production during the war, and to expedite reconversion from war production to civilian production as war conditions permit;

(b) to assure to prime contractors and subcontractors, small and large, speedy and equitable final settlement of claims under terminated war contracts, and adequate interim financing until such final settlement;

(c) to assure uniformity among Government agencies in basic policies and administration with respect to such termination settlements and interim financing;

(d) to facilitate the efficient use of materials, manpower, and facilities for war and civilian purposes by providing prime contractors and subcontractors with notice of termination of their war contracts as far in advance of the cessation of work thereunder as is feasible and consistent with the national security;

(e) to assure the expeditious removal from the plants of prime contractors and subcontractors of termination inventory not to be retained or sold by the contractor;

(f) to use all practicable methods compatible with the foregoing objectives to prevent improper payments and to detect and prosecute fraud.

SETTLEMENT OF SUBCONTRACTORS CLAIMS—CONCLUSIVENESS OF SETTLEMENTS

SEC. 107 (a) Where, in connection with the settlement of any termination claim by a contracting agency, any war contractor makes settlements of the termination claims of his subcontractors, the contracting agency shall limit or omit its review of such settlements with subcontractors to the maximum extent compatible with the public interest. Any contracting agency (1) may approve, ratify, or authorize such settlements with subcontractors upon such evidence, terms, and conditions as it deems proper; (2) shall vary the scope and intensity of its review of such settlements according to the reliability of the war contractor, the size, number, and complexity of such claims, and other relevant factors; and (3) shall authorize war contractors to make such settlements with subcontractors without review by the contracting agency, whenever the reliability of the war contractor, the amount or nature of the claims, or other reasons appears to the contracting agency to justify such action. Any such settlement of a subcontract approved, ratified, or authorized by a contracting agency shall be final and conclusive as to the amount due to the same extent as a stttlement under subsection (c) of section 6 of this Act, and no war contractor shall be liable to the United States on account of any amounts paid thereon except for his own fraud.

PERSONAL FINANCIAL LIABILITY

SEC. 115 (a) Whenever any payment is made from Government funds to any war contractor or other person

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as an advance, partial or final payment on any termination claim, or pursuant to any loan, guaranty, or agreement for the purchase of any loan, or any commitment in connection therewith, entered into by the Government, no officer or other Government agent authorizing or approving such payment or settlement, or certifying the voucher for such payment, or making the payment in accordance with a duly certified voucher, shall be personally liable for such payment, in the absence of fraud on his part. In settling the accounts of any disbursing officer the General Accounting Office shall allow any such disbursements made by him notwithstanding any other provisions of law.

§ 115 (b) For the purpose of making termination settlements or interim financing any Government agency is authorized to rely upon such certificates of war contractors as it deems proper and to permit war contractors and other persons to rely upon such certificates without financial liability in the absence of fraud on their part.

The General Accounting Office

§ 116 (a) Any other provision of law notwithstanding, the function of the General Accounting Office with respect to any termination settlement made, authorized ratified, or approved by a contracting agency shall be confined to determining, after final settlement, (1) whether the settlement payments to the war contractor were made in accordance with the settlement, and (2) whether the records transmitted to it, or other information, warrant a reasonable belief that the settlement was induced by fraud. For this purpose the General Accounting Office shall have the authority to examine any records maintained by any contracting agency or by any war contractor relating to any termination settlement.

§ 116 (b) Whenever the Comptroller General is convinced that any settlement was induced by fraud, he shall so certify, together with all the facts relating thereto, to

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the Department of Justice, to the Director, and to the contracting agency concerned. Upon receipt of such certificate (1) the Department of Justice shall make an investigation to determine whether such settlement was induced by fraud, and (2) until the Department of Justice notifies the contracting agency that in its opinion the facts do not support the belief that the settlement was induced by fraud, the contracting agency, by set-off or otherwise, may withhold, from amounts owing to the war contractor by the United States under such settlement or otherwise, the amount of the settlement, or the portion thereof, which, in the opinion of the Comptroller General as stated in his certificate, was affected by the fraud. In any such case the Department of Justice shall take such action as it deems appropriate to recover payments made to such war contractor. The General Accounting Office shall not suspend credit to any disbursing officer on any disbursements made by him under such settlement in the absence of fraud on his part.

RECORDS, FORMS, REPORTS

§ 118 (d) The Director shall make such investigations as he deems necessary or desirable in connection with termination settlements and interim financing. For this purpose he may utilize the facilities of any existing agencies and if he determines that the facilities of existing agencies are inadequate, he may establish a unit in the Office of Contract Settlement to supplement and facilitate the work of existing agencies. He shall report to the Department of Justice any information received by him indicating any fraudulent practices, for appropriate action.

§ 118 (e) Whenever any contracting agency or the Director believes that any settlement was induced by fraud, the agency or Director shall report the facts to the Department of Justice. Thereupon, (1) the Department of Justice shall make an investigation to determine whether such

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settlement was induced by fraud, and (2) until the Department of Justice notifies the contracting agency that in its opinion the facts do not support the belief that the settlement was induced by fraud, the contracting agency, by set-off or otherwise, may withhold, from amounts owing to the war contractor by the United States under such settlement or otherwise, the amount of the settlement, or the portion thereof, which, in its opinion, was affected by the fraud. In any such case the Department of Justice shall take such action as it deems appropriate to recover payments made to such war contractor.

PRESERVATION OF RECORD; PROSECUTION OF FRAUD

§ 119 (b) The first section of the Act of August 24, 1942 (56 Stat. 747; title 18, U. S. C., Supp. II, sec. 590a), is amended to read as follows:

"The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law."

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§ 119 (c) (1) Every person who makes or causes to be made, or presents or causes to be presented to any officer, agent, or employee of any Government agency any claim, bill, receipt, voucher, statement, account, certificate, affidavit, or deposition, knowing the same to be false, fraudulent, or fictitious or knowing the same to contain or to be based on any false, fraudulent, or fictitious statement or entry, or who shall cover up or conceal any material fact, or who shall use or engage in any other fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any benefit, payment, compensation, allowance, loan, advance, or emolument from the United States or any Government agency in connection with the termination, cancelation, settlement, payment, negotiation, renegotiation, performance, procuremen, or award of a contract with the United States or with any other person, and every person who enters into an agreement, combination, or conspiracy so to do, (1) shall pay to the United States an amount equal to 25 per centum of any amount thereby sought to be wrongfully secured or obtained but not actually received, and (2) shall forfeit and refund any such benefit, payment, compensation, allowance, loan, advance, and emolument received as a result thereof and (3) shall in addition pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit.

§ 119 (d) The provisions of section 35-A of the Criminal Code (18 U. S. C., sec. 80) shall apply to any statement, representation, bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition made or used or caused to be made or used for any purpose under this Act or under any regulations pursuant to this Act.

Surplus Property Act of 1944. October 3, 1944 c. 479 § 479 c. 28 (58 Stat. 781) U. S. C. A. Title 50 App. § 1611 et seq.

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Objectives

§ 1611 The Congress hereby declares that the objectives of this Act are to facilitate and regulate the orderly disposal of surplus property so as—

(a) to assure the most effective use of such property for war purposes and the common defense;

(b) to give maximum aid in the reestablishment of a peacetime economy of free independent private enterprise, the developmnt of the maximum of independent oprators in trade, industry, and agriculture, and to stimulate full employment;

(c) to facilitate the transition of enterprises from wartime to peacetime production and of individuals from wartime to peacetime employment;

(d) to discourage monopolistic practices and to strengthen and preserve the competitive position of small business concerns in an economy of free enterprise;

(e) to foster and to render more secure family-type farming as the traditional and desirable pattern of American agriculture;

(f) to afford returning veterans an opportunity to establish themselves as proprietors of agricultural, business, and professional enterprises;

(g) to encourage and foster post-war employment opportunities;

(h) to assure the sale of surplus property in such quantities and on such terms as will discourage disposal to speculators or for speculative purposes;

(i) to establish and develop foreign markets and promote mutually advantageous economic relations between the United States and other countries by the orderly disposition of surplus property in other countries;

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(j) to avoid dislocations of the domestic economy and of international economic relations;

(k) to foster the wide distribution of surplus commodities to consumers at fair prices;

(l) to effect broad and equitable distribution of surplus property;

(m) to achieve the prompt and full utilization of surplus property at fair prices to the consumer through disposal at home and abroad with due regard for the protection of free markets and competitive prices from dislocation resulting from uncontrolled dumping;

(n) to utilize normal channels of trade and commerce to the extent consistent with efficient and economic distribution and the promotion of the general objectives of this Act (without discriminating against the establishment of new enterprises);

(o) to promote production, employment of labor, and utilization of the productive capacity and the natural and agricultural resources of the country;

(p) to foster the development of new independent enterprise;

(q) to prevent insofar as possible unusual and excessive profits being made out of surplus property;

(r) to dispose of surplus property as promptly as feasible without fostering monopoly or restraint of trade, or unduly disturbing the economy, or encouraging hoarding of such property, and to facilitate prompt redistribution of such property to consumers;

(s) to dispose of surplus Government-owned transportation facilities and equipment in such manner as to promote an adequate and economical national transportation system; and

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(t) except as otherwise provided, to obtain for the Government, as nearly as possible, the fair value of surplus property upon its disposition.

Civil Remedies and Penalties

§ 1635 (a) Where any property is disposed of in accordance with this Act and any regulations prescribed under this Act, no officer or employee of the Government shall (1) be liable with respect to such disposition except for his own fraud or (2) be accountable for the collection of any purchase price which is determined to be uncollectible by the agency responsible therefor.

(b) Every person who shall use or engage in or cause to be used or engaged in any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Government agency in connection with the disposition of property under this Act; or who enters into an agreement, combination, or conspiracy to do any of the foregoing—

(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or

(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or

(3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained and the United States shall retain as liquidated damages any consideration given to the United States or any Government agency for such property.

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U. S. C. Title 18, § 88. (Criminal Code, section 37)

Conspiring to commit offense against the United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years or both. (R. S. Sec. 5440; May 17, 1879, c. 8, 21 Stat. 4; Mar. 4, 1909, c. 321, Sec. 37, 35 Stat. 1096.)

Act of March 4, 1909, c. 321 § 28 (35 Stat. 1094), U. S. C. Title 18, § 72 [Criminal Code, section 28]

Making, forging, counterfeiting, or altering bonds, bids, or public records; transmitting such papers. Whoever shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly aid, or assist in the false making, altering, forging, or counterfeiting, any bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing for the purpose of defrauding the United States; or shall utter or publish as true, or cause to be uttered or published as true, or have in his possession with the intent to utter or publish as true, any such false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing, for the purpose of defrauding the United States, knowing the same to be false, forged, altered or counterfeited; or shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, the office of any officer of the United States, any such false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing, knowing the same to be false, forged, altered, or counterfeited, for the purpose of defrauding the United States, shall be fined not more than $1,000, or imprisoned not more than ten years, or both. (R. S. §§ 5418, 5479; Mar. 4, 1909, c. 321, Sec. 28, 35 Stat. 1094).

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2. Legislative Materials

House Calendar No. 134

73D CONGRESS
2D SESSION

H. R. 8046

[Report No. 829]

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 16, 1934

Mr. SUMNERS of Texas introduced the following bill; which was referred to the Committee on the Judiciary and ordered to be printed

FEBRUARY 22, 1934

Referred to the House Calendar and ordered to be printed

A BILL

To provide a penalty for the knowing or willful presentation of any false written instrument relating to any matter within the jurisdiction of any Department or agency of the Government with intent to defraud the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every person who with intent to defraud the United States knowingly or willfully makes or aids or assists in the making, or who with such intent in anywise procures the making or presentation of any false or fraudulent affidavit, declaration, statement, certificate, voucher, or paper or writing purporting to be such, concerning or

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pertaining to any application, bond, bid, loan or payment thereof, or concerning or pertaining to any matter within the jurisdiction of any department, establishment, administration, agency, office, board, or commission of the United States or any corporation owned or controlled by the United States in whole or in part, shall be punished by a fine not exceeding $5,000 or by imprisonment for a term of not more than five years, or by both such fine and imprisonment.

Senate Report No. 1544, July 13, 1942, 77th Congress, 2nd session, (to accompany H. R. 6484.)

The Committee on the Judiciary to whom was referred the bill (H. R. 6484) to suspend during the present war the running of the Statute of Limitations applicable to certain offenses having considered same report on the bill favorably to the Senate with an amendment, with recommendations that it, as amended, do pass. The amendment follows:

Page 1, line 7, strike out after word suspended and in line 8 strike out the following "of the present war and for six months thereafter" and insert in lieu thereof "until June 30, 1945 or until such earlier time as the Congress by concurrent resolution or the President may designate."

The purpose of the proposed legislation is to suspend any existing statute of limitations applicable to offenses involving the defrauding or attempting to defraud the United States or any agency thereof for the period of the present war. Contracting for the United States is done through various agencies, including the departments and independent establishments and government owned and government controlled corporations and frauds against all of these agencies are intended to be embraced by the bill.

During the World War many frauds committed against the government were not discovered until the three year

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Statute of Limitations had almost expired and, as stated in the Committee report hereafter referred to many of the alleged offenses were barred from prosecution. The general criminal statute (Rev. Stat. § 1044) was amended on November 17, 1921, extending the period to six years in respect to offenses involving frauds against the U. S. (42 Stat. 220 U. S. C. title 18, Sec. 582). This provision was repealed by the Act of December 27, 1927 (45 Stat. 51).

In connection with the World War legislation of this character, the committee Report (H. Rep. 365, 67th Cong.) stated the following:

> "The Department of Justice has been engaged in the investigation and is now engaged in the investigation of various alleged offenses, consisting largely of frauds against the government which are claimed to have occurred during the war with Germany and since its conclusion. Many of these alleged offenses grew out of the contractual relation of the Government with various persons and corporations engaged in the furnishing of military and naval supplies of various kinds. Many of these transactions require the most minute investigation to ascertain the exact facts, and in every case a considerable period must elapse before such facts may be gathered from the files and other sources that the Department may know whether prosecutions are justified or not. In many cases, months and perhaps considerably longer periods will be required for such investigations. Under the existing statute of limitations quoted above many of these alleged crimes are already barred and in all such cases under the law, no prosecutions can be had if any might be thought advisable. * * * "

During normal times the present three year statute of limitations may afford the Department of Justice sufficient time to investigate, discover and gather evidence to prosecute fraud against the government. The United States,

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however, is engaged in a gigantic war program. Huge sums of money are being expended for materials and equipment in order to carry on the war successfully. Although steps have been taken to prevent and prosecute frauds against the government, it is recognized that in the varied dealings, opportunities will no doubt be presented for unscrupulous persons to defraud the government or some agency. These frauds may be difficult to discover as is often true of this type of offense and many of them may not come to light for some time to come. The law enforcement branch of the Government is also busily engaged in its other duties, including the enforcement of the espionage, sabotage and other laws.

Your committee is of the opinion that action should be taken at this time to extend the limitations statute so that frauds may be discovered and punished even after the termination of the present conflict and to insure that the limitations statute will not under stress of present day events operate for the protection of those who would defraud or attempt to defraud the United States.

The proposed measure has been cleared with the legislative committee of the Department of Justice and with the Bureau of the Budget.

The Secretary of the Interior
Washington, February 7, 1934

Hon. Henry F. Ashhurst
Chairman, Committee on the Judiciary,
United States Senate.

My Dear Senator Ashurst: There is transmitted herewith a draft of a proposed bill providing a penalty for the presentation of a false written instrument relating to any matter within the jurisdiction of the Secretary of the Interior, Administrator of the Federal Emergency Administration

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of Public Works, or Administration of the Code of Fair Competition for the Petroleum Industry.

A large number of cases are arising constantly in the enforcement of the laws relating to the Interior Department; the transaction of business in connection with the Public Works Administration; in violations of the code of fair competition for the petroleum industry; and enforcement of regulations under section 9 (c) of the National Industrial Recovery Act of June 16, 1933, which are not susceptible of successful prosecution on charges of perjury, and there is no law at present under which prosecution may be secured for the presentation of false papers.

The early enactment of this legislation is especially desired, so that prompt and vigorous steps may be taken while expenditures are being made of Public Works Administration funds, in view of the following provisions of section 2 (c) of the National Industrial Recovery Act:

"This title shall cease to be in effect and any agencies established hereunder shall cease to exist at the expiration of 2 years after the date of enactment of this act, or sooner if the President shall by proclamation or the Congress shall by joint resolution declare that the emergency recognized by section 1 has ended." It is respectfully requested that the proposed measure be placed before the Senate for appropriate action.

Sincerely yours,

Harold L. Ickes
Secretary of the Interior

[78 Congressional Record, pt. 6, p. 2859]

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 816

CARL ALDO MARZANI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The main opinion of the Court of Appeals (R. 272-281) and the opinion on petition for rehearing (R. 292-293) are not yet reported. The opinion of the district court on motion to dismiss the indictment (R. 20-30) is reported at 71 F. Supp. 615.

JURISDICTION

The judgment of the Court of Appeals was entered February 2, 1948 (R. 282), and a petition for

rehearing (R. 283-290) was denied April 22, 1948 (R. 294). The petition for a writ of certiorari was filed May 22, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether Section 35A of the Criminal Code, which interdicts the wilful making of a false or fraudulent statement in any matter within the jurisdiction of a department of the United States, reaches a willfully false oral statement of material fact to a responsible official of the State Department, who was charged with determining whether petitioner was a security risk and should be permitted to hold office in that Department.

2. Whether petitioner was prejudiced by the alleged error of the trial judge in not excluding the first nine counts of the indictment on the ground that they were barred by the statute of limitations.

3. Whether the trial judge excluded otherwise admissible evidence because of its possible prejudicial effect on the jury, the jury having among its members nine Negroes.

STATUTE INVOLVED

Section 35A of the Criminal Code (18 U.S.C. 80) provides:

> Whoever shall make or cause to be made or present or cause to be presented, for payment

or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; *or whoever shall knowingly and willfully falsify or* conceal or cover up by any trick, scheme, or device a material fact, *or make or cause to be made any false or fraudulent statements or representations,* or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry *in any matter within the jurisdiction of any department or agency of the United States* or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. (Italics added.)

STATEMENT

On January 17, 1947, petitioner was indicted in the United States District Court for the District of Columbia in eleven counts for having made false and fraudulent statements to representatives of government agencies in the course of an investigation as to his character and fitness for federal employment, in violation of Section 35A of the Crim-

inal Code (18 U. S. C. 80) (R. 2-19). After a jury trial, he was convicted on all counts (R. 45-46) and sentenced generally to imprisonment for a period of from one to three years (R. 47). Upon appeal to the United States Court of Appeals for the District of Columbia, the judgment was affirmed as to counts 10 and 11 and reversed as to the first nine counts on the ground that they were barred by the statute of limitations (R. 282, 294).

The evidence in support of the judgment may be summarized as follows:

The making of the statements. On March 7, 1942, petitioner was given an indefinite appointment to the position of Junior Economic Editor in the Office of the Coordinator of Information, subject to a character and fitness investigation (Gov. Ex. 8). On July 29, 1942, in the course of the investigation, petitioner, while under oath, was interrogated by an agent of the Federal Bureau of Investigation. The stenographic transcript of the proceedings (R. 244-246) discloses that petitioner denied that he ever had been a member of the Communist Party (count 1); that he ever had attended meetings of the Communist Party (count 2); that he ever had contributed services to the Communist Party (count 3); and that he ever had participated in any of the activities of the Communist Party (count 4).

On November 23, 1942, in the further course of the investigation, petitioner, while under oath, was interrogated by an agent of the Civil Service Com-

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mission. The stenographic transcript of this proceeding (R. 246-249) shows that petitioner denied that he had ever been a member of the Communist Party (count 6); and that he had ever made any speeches against conscription (count 7).

Petitioner was rated ineligible for federal employment and on February 10, 1943, he took an appeal to the Civil Service Commission's Board of Appeals and Review. A hearing was had on April 20, 1943, and petitioner, testifying under oath, stated, *inter alia,* that he had never used the name or had been known as Tony Whales (count 8), and that he never had made any speeches against conscription (count 9) (R. 249-250). The Board of Appeals and Review reversed the earlier determination and rated petitioner as eligible for federal employment (Gov. Ex. 32; Tr. 334-335).[1]

Petitioner remained in federal employment until August or September 1943, when he was inducted into the Army (R. 173). The Army assigned him to his former job, which was then in the office of Strategic Services (R. 173-174). In September 1945, petitioner was discharged from the Army and he resumed his civilian position, which was then in the State Department, as a result of a transfer of functions from the Office of Strategic Services (R. 175). He was Deputy Chief of the Presenta-

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[1] Note should be taken of the fact that evidence which later became available and constituted the bulk of the Government's case in the trial court was not then available and, of course, was not considered by the agencies of the Civil Service Commission (see R. 68).

tion Division and was engaged in the preparation "of reports for high officials in the State Department in a form which was quicker and more concise and clearer, and so on" (R. 175).

The State Department had established a Security Division for the purpose of screening employees absorbed from other agencies. The situation in respect of petitioner was brought to the attention of the Deputy Assistant Secretary for Administration, Mr. Panuch, and on April 30, 1946, he directed a subordinate to request petitioner's resignation from the State Department (R. 47-48). On June 1, 1946, after he had been requested to resign, petitioner obtained an interview with Mr. Panuch for the purpose of discussing the security matter in which he was involved (R. 48). Panuch told (R. 49) petitioner that the charges against him were—

> that you were a Communist, a member of the Communist Party in 1940 and 1941, and that you were a Communist organizer; that you operated in front organizations in New York. * * * That you operated under the alias of Tony Whales; that your wife was a member of the Communist Party and that her Communist Party name was Edith Charles; that you opposed conscription; that you made a false statement with respect to your financial resources to get a job with W.P.A., and that statement was made under oath; and that you signed a petition as a member of the Communist Party for the * * * election of Earl Browder as Congressman.

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Petitioner specifically denied each charge (R. 49-50). His denial that he ever had been a member of the Communist Party (R. 50) is the basis for count 10 of the indictment, and count 11 is founded on his denial that he ever had used the name or had been known as Tony Whales (R. 50). Panuch testified (R. 52) that the conference lasted over two hours and "was in the nature of an appeal" from his subordinate's request of petitioner that he submit his resignation. According to Panuch, "the man was appearing before me as Deputy Assistant Secretary, and he was entitled to have his day in court, and we just threshed the matter out thoroughly" (R. 52).

Thereafter, a further investigation of petitioner's activities was conducted and this disclosed convincing proof of the charges made against petitioner, for information was obtained from New New York City Detective Drew (see, *infra*, pp. 8-15) concerning Drew's undercover activities in the Communist Party and other groups, at a time when petitioner also was active in those various organizations (R. 54). In November 1946, petitioner sought to resign from the State Department (R. 54-55), but that agency discharged him in the interest of the United States (Gov. Ex. 35, Tr. 286, 360).

The falsity of the statements. To establish the falsity of the statements in question the Government relied principally upon the testimony of New York City Detective Drew who, in the performance of his duties, had infiltrated into the Com-

munist Party and other groups dominated by it, and the testimony of two former members of the Communist Party.

Drew testified that in the performance of his assigned police duties, he joined the Communist Party on July 22, 1940, using the name "William Easley," and that petitioner was present in the office when he joined (R. 92-93). Drew paid his fees and was issued a Communist Party membership book (R. 93). That evening Drew attended a meeting presided over by petitioner's wife (R. 93, 94), a member of the Communist Party (R. 231). Petitioner was among those present, and was introduced to Drew as Tony, a national committeeman (R. 94).[2] The presiding official at the meeting, petitioner's wife, stated, *inter alia,* that the country was on the verge of an imperialist war; that the time was ripe to bring to the people the need for peace and the Communist Party; and that the comrades should all support Congressman Marcantonio in all his endeavors (R. 94). Detective Drew further testified to the following events, occurring respectively on the dates noted:[3]

July 23, 1940: Drew attended a class for recruits in the Communist Party at local headquarters for the organization. Petitioner conducted the class

[2] Approximately one month later Drew learned that petitioner's name was Tony Whales (R. 94).

[3] In the course of his testimony, Drew, for the purpose of refreshing his recollection, frequently referred to reports he made to his superiors in the police department at the time of the events in question (R. 97).

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and instructed those present on the subjects of race discrimination, white chauvinism, and the principles of communism (R. 96-97).

July 29, 1940: Drew reported to petitioner, his organizer, at local Communist Party headquarters concerning his activities on a petition campaign. Petitioner told Drew that he was pleased and that "he could see that I had the makings of a good comrade" (R. 97).

August 6, 1940: After attending a recruit class at the Section Headquarters of the Communist Party, Drew, petitioner and others assembled in the main room where one Appel, a section organizer,[4] informed them of a mass demonstration to be held that night at Times Square, and instructed them to leave all identification possessed on their persons at the Communist Party headquarters in order that "if the police did pick us up we would not have anything to identify us as being Communists" (R. 98).

August 9, 1940: Drew attended a meeting of Branch F-2 of the Communist Party, at which

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[4] The Communist Party in New York City was divided into sections, located in the various assembly districts. At the head of a section is a section organizer, who has an executive secretary, executive educational director and executive daily worker manager. Each section also has an executive committee. A section is composed of many branches and each branch, in turn, is composed of many groups. The offices in the subdivisions are comparable to the offices in the section. Petitioner was a branch organizer—a leader of a branch—and a member of the section executive committee. He also held office as a section educational director (R. 101-102).

petitioner delivered a speech against conscription (R. 98-99).

August 12, 1940: Petitioner requested Drew to turn in his Communist Party membership book. Petitioner told Drew that "I want your card in order that the name may be changed, so as to protect you on your job against anything that may happen by the Government if they happen to outlaw the Communist Party and they would find out that you are a member, it would throw you out of your job." Drew surrendered his card to petitioner and the two then attended a Communist Party meeting (R. 99).

September 3, 1940: Drew attended a regular Branch meeting, at which petitioner presided. After the meeting had commenced, Appel, a section organizer, came in and took the floor. He told the members present that it was "control week" and that "all the membership books, papers and records in the Communist Party were going to be burned * * * so that there would be no record left to reveal his [the member's] identity or any of the records pertaining to the Party." Petitioner then resumed control of the meeting and called for a delegation to go to Congressman Ellenstein's home to protest the then pending draft legislation, it being understood that the protestors would do this as "citizens" and not "Communist members" (R. 100-101).

September 5, 1940: Drew attended an open air meeting presided over by petitioner. Petitioner

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opened the meeting by stating that the meeting was called by the Communist Party of the Sixth Assembly District. The meeting was concerned with steps to defeat the pending draft legislation. One of the speakers was petitioner's wife, who was introduced by petitioner as "Comrade Edith" (R. 102-103).

September 16, 1940: Drew attended a regular Branch meeting of the Communist Party. In the course of the meeting petitioner came in and announced that he wanted to discuss with the Branch the question of expelling two comrades. Petitioner said that these two "were not participating as Communists, they did not canvass, they were afraid to circulate as Communists, and he felt they should be expelled" (R. 103-104).

October 14, 1940: Drew attended a regular Branch meeting of the Communist Party. This was subsequent to the enactment of the Selective Training and Service Act. During the meeting petitioner came in and asked to speak, stating that "now the young men in the Communist Party must get into the Army so that we can disintegrate the morale of the men in order that the Communists may take over; that we could do a big job in helping the men with their grievances, forcing their fights, and teaching them Communism. In this way we could soon overthrow the Capitalists and also take over control of the Army. We were to work on the officers as well as the men, and this job was espe-

cially assigned to young men of conscription age" (R. 104-105).

October 17, 1940: At petitioner's request, Drew joined him at local Party headquarters for the purpose of folding literature and cleaning the office. They each discussed their reasons for joining the Communist Party and in the course of the conversation petitioner said that he had also caused his wife to join the Party (R. 105-106).

November 20, 1940: Drew and Appel, the section organizer, were working at local Party headquarters burning records and literature when petitioner came in. Drew told petitioner that he and several other Negroes that had been Party members were organizing the National Negro Congress, and petitioner expressed satisfaction with the work that Drew was doing (R.106-107).

November 25, 1940: Drew attended the regular Branch meeting of the Party, at which petitioner was present (R. 107).

December 2, 1940: Drew attended a regular Branch meeting of the Communist Party. At the meeting, petitioner advocated an increase in their activities in recruiting new members and announced "a general functionary's meeting to be held for the purpose of receiving the report" on the recent Communist Party convention (R. 107-108).

December 9, 1940: Drew attended a regular Branch meeting, at which petitioner exhorted those present to sell more copies of the Daily Worker and

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the Sunday Worker and to stir up opposition to the Smith-Connolly Bill, which was then pending in Congress, on the ground that the bill would outlaw strikes and thus was against the principles of the Communists (R. 109-110).

December 16, 1940: Drew attended a regular Branch meeting, at which petitioner presided. Those present were instructed on how to prepare leaflets and to duplicate them (R. 111).

January 31, 1941: Petitioner and Drew were present at a social affair of the National Negro Congress. Drew introduced petitioner to those present as Tony Whales, a member of the Communist Party (R. 111).

February 11, 1941: At a meeting at local Party headquarters, petitioner introduced Drew to one Daniels, a new section organizer. Drew discussed his work with the National Negro Congress, and petitioner counselled him in steps to be taken in the future, assuring Drew that the Communist Party "would be back of us and would give us all their assistance" (R. 111-112).

February 22, 1941: Drew met with members of the Communist Party Section Executive Committee composed of petitioner and three others. Drew discussed the National Negro Congress. Petitioner, as Section Educational Director of the Communist Party, was assigned to assist Drew in preparing literature for the National Negro Congress, and it was agreed at the meeting that the Communist Party's office and machines were to be used

for this purpose. Following the meeting petitioner and Drew prepared a leaflet "about discrimination" (R. 113).

February 28, 1941: Drew went to Petitioner's home to obtain certain leaflets and observed a Communist Party meeting taking place at the time (R. 114).

March 18, 1941: Drew attended a meeting of the National Negro Congress at which petitioner, one Louis Harper (see, *infra*, pp. 15-16) and Drew spoke. Petitioner was introduced to the gathering as Tony Whales (R. 114-115).

April 3, 1941: Drew called and attended a meeting of all Communist Party members in the National Negro Congress and "progressives from other organizations." Petitioner told those present that he could not remain at the meeting, but announced that Louis Harper (see, *infra*, pp. 15-16) was going to conduct a class for the Communist Party, with Negroes from the National Negro Congress and other organizations, and that he "wanted all the colored comrades to attend this class." Petitioner also stated that those present needed studying and education along the "party line" (R. 115-116).

April 4, 1941: Drew attended a meeting sponsored by the National Negro Congress. Petitioner delivered a political discussion, speaking about how many Communists were in this country at that time and stating that "we outnumbered the number of Communists in Russia during 1917 when the revo-

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lution took place"; that "now was the time for revolution"; and that "the Communists could have a revolution in this country." He also urged those in attendance to attend the class being conducted by Harper and to attend the Worker's School, for the betterment of their organization (R. 116).

May 28, 1941: A meeting was held at petitioner's home, at which members of the National Negro Congress met with the Section Executive Committee of the Communist Party. Petitioner, Drew and Harper were among those present. The meeting was concerned with the downfall of the National Negro Congress on the East Side and with plans for rebuilding the organization "without the visible aid of the Communist Party" (R. 116-117).

September 3, 1941: Drew talked with petitioner at Communist Party headquarters (R. 121).

September 22, 1941: Drew visited the home of one Mary Farnum for the purpose of attending a Communist Party Executive Committee meeting, which was cancelled. While he was there, petitioner brought leaflets to Farnum, stating that it was her responsibility to see that the comrades distributed them (R. 121-122).

Louis Harper, another government witness, gave testimony that substantiated important aspects of Drew's testimony. Harper was a regular member of the Communist Party from 1932 to 1938 and attended some meetings thereafter (R. 71, 73, 78). He met petitioner in 1940 and knew him as Tony Whales (R. 72). Later Harper came to know peti-

tioner as Carl Marzani, as a result of their membership in two other organizations (R. 72). He attended a meeting of the Communist Party at which petitioner and "Bill Easley" were present[5] (R. 73). Harper testified concerning activities on his part and on the part of Drew and petitioner in behalf of the National Negro Congress (R. 74-79), and that petitioner participated in those activities as a representative of the Communist Party (R. 77-78).

Another government witness, George Hewitt, was a member of the Communist Party from 1927 to 1944 (R. 255). In 1930 he went to Russia and remained there for about two years, during which time he attended the International Lenin School. The purpose of the schooling was "learning espionage"; learning how to become "professional revolutionist"; and learning theory "that would ultimately lead to the overthrow of the United States Government" (R. 255). In 1940 Hewitt was a teacher in the Communist Party's Workers School (R. 256). He used the name "Tim Holmes" to conceal his identity (R. 256). Detective Drew, using his pseudonym of "Bill Easley," was a student in the school (R. 256). Through Drew, Hewitt met petitioner in 1940 and knew him as Tony Whales (R. 257), the Educational Director of a section of the Communist Party (R. 257-258).

[5] Harper did not know until the time of the trial that "Bill Easley" was in fact Detective Drew (R. 73.)

Hewitt met petitioner a second time at the State Headquarters of the Communist Party in New York City, at an educational organizer's meeting (R. 260-261).

In the course of his testimony for the defense, petitioner admitted knowing Harper (R. 185), but denied ever having known Hewitt or Detective Drew (R. 193). On cross-examination, he admitted that he signed and was active in securing signatures on a petition for the nomination of Earl Browder on the Communist Party ticket, as a candidate for representative in Congress, at an election that was held on February 6, 1940 (R. 218-221; see also R. 222-228).

ARGUMENT

Of the three contentions made by petitioner, the first two stem from the fact that the court below determined that the statute [6] suspending the run-

[6] 18 U.S.C., Supp. V, 590a provides:

"The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, or (3) committed in connection with the care and handling and disposal of property under the Surplus Property Act of 1944, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing

ning of the statute of limitations for offenses involving the defrauding of the United States or any of its agencies does not apply to the offenses here, and that the first nine counts of the indictment—involving false statements during the period from July 29, 1942 to April 20, 1943[7]—were therefore barred by the normal three-year period of limitation.[8] It was the view of the court below (see R. 274-276) that the suspension statute applied only to frauds involving property or financial loss to the Government. This aspect of the court's decision was favorable to petitioner, and he, of course, does not challenge it in this Court. Already this Term, we have expressed our firm disagreement with the construction of the suspension act adopted by the court below, on the primary ground that it is in the teeth of the legislative history of the provision, which discloses a specific congressional intent to have the suspension statute apply to offenses under Section 35A of the Criminal Code, which is the provision involved in this case. See our brief in opposition, pp. 25-35, in *Harold Gottfried and Pure Rock Mineral Springs Corporation* v. *United States*, No. 561. That case squarely presented the question whether a false statement made to a local war Price and Rationing Board, in violation of Section 35A of the Criminal Code, was within the

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statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law."

[7] The indictment was returned January 17, 1947 (see R. 273).

[8] See 18 U.S.C. 582.

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terms of the suspension act. The Second Circuit held that it was and rejected the view adopted by the court below. *United States* v. *Gottfried*, 165 F. 2d 360, 367-368. And we strongly oppose a petition for a writ of certiorari, which relied, *inter alia*, upon this phase of the opinion of the court below. It should be noted, however, that we pointed out that the opinion below on this point was a dictum since the general sentence was supported by counts 10 and 11. Certiorari was denied March 29, 1948, and a petition for rehearing was denied April 26, 1948. Only if either of the first two contentions urged by petitioner is meritorious is there any occasion to reach this question in this case. Since we perceive no merit in them, we do not at this time press upon the Court our construction of the suspension act[9]—and thus create a possible basis for certiorari.

1. Petitioner's first contention (Pet. 16-23) is that counts 10 and 11 do not charge violations of Section 35A of the Criminal Code because the false statements in question were made informally and were not made under oath and were not stenographically transcribed. Section 35A proscribes "whoever shall knowingly and willfully * * * make or cause to be made any false or fraudulent

[9] Since we are entitled to support the judgment of the court below on any available ground, this point is open and might be asserted in this Court, if necessary. See *Helvering* v. *Gowran*, 302 U. S. 238, 245; *Securities Comm'n* v. *Chenery Corp.*, 318 U. S. 80, 88.

statements or representations * * * in any matter within the jurisdiction of any department or agency of the United States * * *." Count 10 (R. 16-18) alleged, *inter alia,* that on June 1, 1946—

> * * * during a conference with a duly authorized officer of the said State Department, who was then and there inquiring into the character and fitness of the said defendant for continued employment by the said Department for the purpose of making recommendations to the said Department concerning the matter of continuing or terminating the aforesaid employment, the said CARL ALDO MARZANI falsely stated and represented that he had never been a member of the Communist Party * * *.

Count 11 (R. 18-19) similarly charged that petitioner falsely stated during the conference that he had never used the name or had been known as Tony Whales.

In evaluating petitioner's contention, it is important to note at the outset that there is no dispute of the fact that petitioner made the statements in question under the circumstances alleged in the indictment. Petitioner does not deny that they were made in a matter within the jurisdiction of a Department of the United States (see R. 23-24). And he does not dispute the fact that the jury had ample basis for concluding that he knowingly and willfully made the false statements. Thus each of

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the elements of the offense as described by Section 35A is indisputably present.

Petitioner's argument is that his deception is not punishable because he was not first sworn and because there is no stenographic transcript of the conference. But this is not a prosecution under the perjury statutes, where an oath is a requisite. Nothing in Section 35A distinguishes deception practiced without an oath from deception with an oath. Similarly there is no requirement that only deception which is stenographically transcribed is punishable. The short of the matter is that the evil is the same in either situation, and Congress quite properly has proscribed it. See *United States* v. *Gilliland*, 312 U. S. 86, 93. In dealing with the statute in question, the Second Circuit in *United States* v. *Zavala*, 139 F. 2d 830, 831, said: "We feel no doubt that Section 80 [Section 35A of the Criminal Code] covers both the use of documents to defraud the government and also the use of any false statement, whether oral or written, as to any matter within the jurisdiction of any department or agency of the United States." [10]

In applying the statute to the facts of this case, we must not be unmindful of the fact that the Government has not sought to prosecute for a false statement made by one of its employees to another in a casual discussion, where the urgent necessity

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[10] See, too, *Spivey* v. *United States*, 109 F. 2d 181, 184-185 (C.C.A. 5), certiorari denied, 310 U. S. 631.

for truthfulness might not have been plain. In this case petitioner knew long before he made the statements in question that there was serious question concerning his employability because of evidence that he had been a member of the Communist Party while using the name Tony Whales. It is evident that when petitioner was requested to terminate his position with the State Department he knew the reasons for the request. He did not seek any formal hearing in an effort to have the request withdrawn. Instead he went to the Deputy Assistant Secretary for Administration, Mr. Panuch, who had determined that petitioner was not suitable for employment in the State Department, and sought to persuade him that the charges against him were untrue.[11] It is evident from the testimony concerning the conference that it was not a casual one in which no one realized that the stakes were high. Mr. Panuch testified that at the opening of the discussion he informed petitioner that he had authorized the request that petitioner resign, and that there were "substantial" security reasons for the request (R. 48-49). Then Mr. Panuch detailed the charges against petitioner and

[11] It is idle to urge, as petitioner does (Pet. 19), that the interview was not in conformity with regulations which provide for the hearing of charges against employees. Petitioner previously had had such hearings before the Civil Service Commission (see, *supra*, pp. 4-5). When he was requested to resign, he did not want or seek another hearing. Instead, he wanted a private conference with the executive of the Department responsible for the request. Having obtained precisely what he sought, he is hardly in a position to complain now that the procedure which he selected should not have been pursued.

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petitioner, in turn, specifically denied each one (R. 49-50), stating, *inter alia,* that "I am not and never was a member of the Communist Party" and that "I was never known as Tony Whales" (R. 50). Petitioner referred Mr. Panuch to the findings in the earlier Civil Service investigation; to his religious background as evidence that he was not a Communist; and he sought to persuade him that the charges resulted from the fact that the personnel of the Security Office of the State Department "were a bunch of country boys who didn't know the difference between a Communist, a liberal, an anarchist, and a Socialist" (R. 51-52).

That Mr. Panuch regarded the matter seriously, and not as mere casual inter-office conversation, is shown by his testimony that the conference lasted over two hours and "was in the nature of an appeal." In Mr. Panuch's words, "the man was appearing before me as Deputy Assistant Secretary, and he was entitled to have his day in court, and we just threshed the matter out thoroughly" (R. 52).

The short of the matter is that petitioner sought an interview with Mr. Panuch, with whom he testified he had "a good personal relationship" (R. 176), for the purpose of persuading him that he was not a security risk. That his denials were persuasive is demonstrated by the fact that the request for petitioner's resignation apparently was not pressed after that until several months later when the extremely damaging information that Detective

Drew had became known to the State Department. Thus, false statements which succeeded in enabling petitioner to remain in a responsible position in the State Department are the basis for his conviction.

It does not avail petitioner to urge that Section 35A is too vague to have informed him that his conduct was punishable. Quite plainly, petitioner was capable of knowing that an inquiry into the question whether he, a responsible official of the State Department, was a security risk to the Department related to a matter within the jurisdiction of the Department. And petitioner does not deny that it was such a matter. Similarly, there is no difficulty in understanding that a deliberate lie as to a material fact is a false or fraudulent statement within the meaning of the statute. Petioner's willful purpose to deceive, as the jury found, is hardly consistent with his present plea of possible surprised innocence.

2. Having succeeded on appeal in obtaining the reversal of his conviction on the first nine counts on the ground that they were barred by the statute of limitations, petitioner now urges (Pet. 23-31) that his conviction on the remaining two counts should also be set aside because evidence on the other counts was received at his trial and the counts were submitted to the jury. In rejecting this contention, the court below held—properly, we believe —that the evidence adduced in support of the first

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nine counts would have been admissible under the last two counts, and that petitioner was not prejudiced by the fact that it was shown that he earlier had also denied to the Federal Bureau of Investigation and the Civil Service Commission that he had been a member of the Communist Party and had used the alias Tony Whales (see R. 276-277).

In seeking to prove the allegations of count 10, that petitioner willfully misrepresented that he had not been a member of the Communist Party in 1940 and 1941, the Government, we submit, was entitled to show any conduct by petitioner which would permit the jury to infer that petitioner was a member of the Party during those years. Such conduct is shown by the evidence which is summarized in the Statement, supra, pp. 4-17. Nothing in the trial record suggests that the evidence was received only in respect of any of the first nine counts. Instead, it is plain that the common thread through all the counts of the indictment was petitioner's relationship to the Communist Party, and evidence showing this was probative as to each of the counts.[12]

Petitioner also urges (Pet. 28-31) that evidence

[12] Petitioner is wrong in his contention (Pet. 25-28) that evidence of other crimes was used against him. As we have said, the Government's evidence as to petitioner's conduct in 1940-1941 was relevant to the issue whether he was a member of the Communist Party in that period. The fact that it might also be proof of other federal or state violations does not detract from its admissibility in this case. As stated by the Second Circuit in *United States* v. *Krulewitch*, 145 F. 2d 76, 80, "if evidence is relevant to prove one crime, it does not become inadmissible because it also proves another."

showing the circumstances of the making of the false statements involved in the first nine counts was prejudicial to him. Assuming, *arguendo*, that such evidence would not have been admissible under the last two counts, the evidence was not hurtful to petitioner. As the court below points out (R. 276-278), evidence showing that during his federal employment petitioner consistently denied to the Civil Service Commission and agents of the Federal Bureau of Investigation that the charges against him were true, supported petitioner's similar denials from the witness stand at his trial. It showed petitioner as steadfastly and consistently denying the charges against him. It is difficult to understand how evidence of such denials could possibly prejudice petitioner, unless and until the jury found that petitioner had been a member of the Communist Party and had used an alias. Once these findings were made, the jury could not very well have escaped a finding of guilt as to counts 10 and 11. The stringent tests for the application of the harmless error rule spelled out in *Kotteakos* v. *United States*, 328 U. S. 750, are, we submit, fully satisfied here.

Nor can we agree with petitioner (Pet. 31-33) that he was erroneously sentenced because of the inclusion of the first nine counts. Petitioner was sentenced generally to a term of from one to three years' imprisonment. In effect, the situation is no different than if the trial judge had imposed the same sentence on each count and then had

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directed that they be served concurrently. This aspect of the argument is foreclosed by *Pinkerton v. United States*, 328 U. S. 640, 641-642, which involved the same situation of a general sentence and some counts which were found on appeal to have been barred by the statute of limitations. If petitioner believes that the trial judge might not have imposed the same sentence if the first nine counts had been out of the case, his remedy is provided by Rule 35 of the Federal Rules of Criminal Procedure. Under that Rule he may, within 60 days after certiorari is denied or a mandate is handed down affirming the judgment, apply to the trial court for a reduction in sentence. By adhering to this procedure, petitioner will afford the trial judge an opportunity to make plain whether the sentence is more severe than it would have been if the first nine counts had been eliminated from the case.

3. Petitioner's final contention is that "the trial court excluded relevant, competent, material and important evidence, involving Negroes and Negro organizations, solely because of the supposed inability of the predominantly Negro jury in the case to weigh such evidence on the same terms as any other representative jury" (Pet. 33-35, 12-16). This contention is utterly lacking in merit and has absolutely no support in the record. The same argument was made in the court below and

was extensively considered and flatly rejected (R. 278-280).

The approach of the court below to the serious charge which petitioner makes was stated by the court as follows (R. 278-279):

> Because of the unique nature of this contention and the seriousness of the error if appellant's version of the reason for the disputed rulings by the court be correct, we have carefully read all the various portions of the printed appendix surrounding the incidents mentioned, although appellant does not cite to us any specific place at which the court indicated such reasons for its rulings. * * * [Appellant's] general statements and the implications are such as to require examination of all that transpired.

The Court of Appeals then discussed in detail each of the three incidents upon which petitioner relies. Not only did the court fail to find that the trial judge's rulings were motivated by the reasons petitioner suggests, but also the court found that the rulings were correct (R. 279-280). In these circumstances, there is no occasion to restate here what the court already has fully stated. The opinion below plainly demonstrates the complete lack of merit in the contention.

CONCLUSION

Petitioner does not contend that the charges against him are not fully sustained by the over-

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powering evidence of guilt set forth in the Statement. The contentions which he does make present no question of merit which requires this Court's examination. We respectfully submit that the petition for a writ of certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 59

CARL ALDO MARZANI, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The main opinion of the Court of Appeals on the original hearing (R. 272-281) and the opinion on petition for rehearing (R. 292-293) are reported at 168 F. 2d 133. The opinion of the district court on motion to dismiss the indictment (R. 20-30) is reported at 71 F. Supp. 615.

JURISDICTION

The judgment of the Court of Appeals was entered February 2, 1948 (R. 282), and a petition for rehearing (R. 283-290) was denied April 22,

1948 (R. 294). The petition for a writ of certiorari was filed May 22, 1948, and the writ was granted June 21, 1948 (R. 295). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 [now 28 U.S.C. 1254]. See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the offense of willfully making a false statement to a department of the United States concerning a matter within its jurisdiction involves "defrauding" the United States within the meaning of 18 U.S.C. [1946 ed.] 590(a), which suspends the running of the statute of limitations applicable to any offense involving the defrauding of any agency of the United States.

2. Whether the application of Section 35A of the Criminal Code, which interdicts the willful making of a false or fraudulent statement in any matter within the jurisdiction of a department of the United States, to the making of willfully false oral statements to a responsible official of the State Department, who was charged with determining whether petitioner was a security risk and should be permitted to hold office in that department, violates petitioner's rights under the Fifth and Sixth Amendments.

3. Whether petitioner was prejudiced by the alleged error of the trial judge in not excluding the

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first nine counts of the indictment on the ground that they were barred by the statute of limitations.

4. Whether the trial judge excluded otherwise admissible evidence because of its possible prejudicial effect on the jury, the jury having among its members nine Negroes.

STATUTES INVOLVED

Section 35A of the Criminal Code (18 U.S.C. [1946 ed.] 80)[1] provided:

> Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; *or whoever shall knowingly and willfully falsify or* conceal or cover up by any trick, scheme, or device a material fact, *or make or cause to be made any false or fraudulent statements or representations,* or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition,

[1] The references in the brief, unless otherwise indicated, are to the statutory provisions as they existed at the time of the offenses in question. Section 35A is now found in Sections 287 and 1001 of Title 18, U.S.C., as codified by the Act of June 25, 1948 (Public 772, 80th Congress).

> knowing the same to contain any fraudulent or fictitious statement or entry *in any matter within the jurisdiction of any department or agency of the United States* or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. [Italics added.]

The Act of August 24, 1942, 56 Stat. 747, as amended by Section 19(b) of the Contract Settlement Act of 1944, 58 Stat. 667, and Section 28 of the Surplus Property Act, 58 Stat. 781 (18 U.S.C. [1946 ed.] 590a),[2] provided:

> The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, or (3) committed in connection with the care and handling and disposal of property under the Surplus Property Act of 1944, shall be suspended until three

[2] This provision is now 18 U.S.C. 3287.

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years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law.

STATEMENT

On January 17, 1947, petitioner was indicted in the District Court of the United States for the District of Columbia in eleven counts for having made false and fraudulent statements to representatives of government agencies in the course of an investigation as to his character and fitness for federal employment, in violation of Section 35A of the Criminal Code (18 U.S.C. [1946 ed.] 80) (R. 2-19). After a jury trial, he was convicted on all counts (R. 45-46) and sentenced generally to imprisonment for a period of from one to three years (R. 47). Upon appeal to the United States Court of Appeals for the District of Columbia, the judgment was affirmed as to counts 10 and 11 and reversed as to the first nine counts on the ground that they were barred by the statute of limitations (R. 282, 294).

The evidence in support of the judgment may be summarized as follows:

The making of the statements. On March 7, 1942, petitioner was given an indefinite appoint-

ment to the position of Junior Economic Editor in the Office of the Coordinator of Information, subject to a character and fitness investigation (Gov. Ex. 8). On July 29, 1942, in the course of the investigation, petitioner, while under oath, was interrogated by an agent of the Federal Bureau of Investigation. The stenographic transcript of the proceedings (R. 244-246) discloses that petitioner denied that he ever had been a member of the Communist Party (count 1); that he ever had attended meetings of the Communist Party (count 2); that he ever had contributed services to the Communist Party (count 3); and that he ever had participated in any of the activities of the Communist Party (count 4).

On November 23, 1942, in the further course of the investigation, petitioner, while under oath, was interrogated by an agent of the Civil Service Commission. The stenographic transcript of this proceeding (R. 246-249) shows that petitioner denied that he had ever used the name "Tony Whales" (count 5); that he had ever been a member of the Communist Party (count 6); and that he had ever made any speeches against conscription (count 7).

Petitioner was rated ineligible for federal employment and on February 10, 1943, he took an appeal to the Civil Service Commission's Board of Appeals and Review. A hearing was had on April 20, 1943, and petitioner, testifying under oath, stated, *inter alia,* that he had never used the name

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or had been known as Tony Whales (count 8), and that he never had made any speeches against conscription (count 9) (R. 249-250). The Board of Appeals and Review reversed the earlier determination and rated petitioner as eligible for federal employment (Gov. Ex. 32; Tr. 334-335).[3]

Petitioner remained in federal employment until August or September 1943, when he was inducted into the Army (R. 173). The Army assigned him to his former work, which was then in the Office of Strategic Services (R. 173-174). In September 1945, petitioner was discharged from the Army and he resumed his civilian position, which was then in the State Department as a result of a transfer of functions from the Office of Strategic Services (R. 175). He was Deputy Chief of the Presentation Division and was engaged in the preparation "of reports for high officials in the State Department in a form which was quicker and more concise and clearer, and so on" (R. 175).

The State Department had established a Security Division for the purpose of screening employees absorbed from other agencies. The situation in respect of petitioner was brought to the attention of the Deputy Assistant Secretary for Administration, Mr. Panuch, and on April 30, 1946, he directed a subordinate to request petitioner's resig-

[3] The evidence which later became available and constituted the bulk of the Government's case in the trial court was not then available and, of course, was not considered by the agencies of the Civil Service Commission (see R. 68).

nation from the State Department (R. 47-48). On June 1, 1946, after he had been requested to resign, petitioner obtained an interview with Mr. Panuch for the purpose of discussing the security matter in which he was involved (R. 48). Panuch told (R. 49) petitioner that the charges against him were—

> that you were a Communist, a member of the Communist Party in 1940 and 1941, and that you were a Communist organizer; that you operated in front organizations in New York. * * * That you operated under the alias of Tony Whales; that your wife was a member of the Communist Party and that her Communist Party name was Edith Charles; that you opposed conscription; that you made a false statement with respect to your financial resources to get a job with W.P.A., and that statement was made under oath; and that you signed a petition as a member of the Communist Party for the * * * election of Earl Browder as Congressman.

Petitioner specifically denied each charge (R. 49-50). His denial that he ever had been a member of the Communist Party (R. 50) is the basis for count 10 of the indictment, while count 11 is founded on his denial that he ever had used the name or had been known as Tony Whales (R. 50). Panuch testified (R. 52) that the conference lasted over two hours and "was in the nature of an appeal" from his subordinate's request of petitioner

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that he submit his resignation. According to Panuch, "the man was appearing before me as Deputy Assistant Secretary, and he was entitled to have his day in court, and we just threshed the matter out thoroughly" (R. 52).

Thereafter, a further investigation of petitioner's activities was conducted and this disclosed convincing proof of the charges made against petitioner, for information was obtained from New York City Detective Drew (see *infra*, pp. 9-17) concerning Drew's undercover activities in the Communist Party and other groups, at a time when petitioner also was active in those various organizations (R. 54). In November 1946, petitioner sought to resign from the State Department (R. 54-55), but that agency discharged him in the interest of the United States (Gov. Ex. 35, Tr. 286, 360).

The falsity of the statements. To establish the falsity of the statements in question the Government relied principally upon the testimony of New York City Detective Drew who, in the performance of his duties, had infiltrated into the Communist Party and other groups dominated by it, and on the testimony of two former members of the Communist Party.

Drew testified that in the performance of his assigned police duties, he joined the Communist Party on July 22, 1940, using the name "William Easley," and that petitioner was present in the

office when he joined (R. 92-93). Drew paid his fees and was issued a Communist Party membership book (R. 93). That evening Drew attended a meeting presided over by petitioner's wife (R. 93, 94), a member of the Communist Party (R. 231). Petitioner was among those present, and was introduced to Drew as Tony, a national committeeman (R. 94).[4] The presiding official at the meeting, petitioner's wife, stated, *inter alia,* that the country was on the verge of an imperialist war; that the time was ripe to bring to the people the need for peace and the Communist Party; and that the comrades should all support Congressman Marcantonio in all his endeavors (R. 94). Detective Drew further testified to the following events, occurring respectively on the dates noted:[5]

July 23, 1940: Drew attended a class for recruits in the Communist Party at local headquarters for the organization. Petitioner conducted the class and instructed those present on the subjects of race discrimination, white chauvinism, and the principles of communism (R. 96-97).

July 29, 1940: Drew reported to petitioner, his organizer, at local Communist Party headquarters concerning his activities on a petition campaign. Petitioner told Drew that he was pleased and that

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[4] Approximately one month later Drew learned that petitioner's name was Tony Whales (R. 94).

[5] In the course of his testimony, Drew, for the purpose of refreshing his recollection, frequently referred to contemporaneous reports which he made to his superiors in the Police Department (R. 97).

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"he could see that I had the makings of a good comrade" (R. 97).

August 6, 1940: After attending a recruit class at the Section Headquarters of the Communist Party, Drew, petitioner and others assembled in the main room where one Appel, a section organizer,[4] informed them of a mass demonstration to be held that night at Times Square, and instructed them to leave all identification possessed on their persons at the Communist Party headquarters in order that "if the police did pick us up we would not have anything to identify us as being Communists" (R. 98).

August 9, 1940: Drew attended a meeting of Branch F-2 of the Communist Party, at which petitioner delivered a speech against conscription (R. 98-99).

August 12, 1940: Petitioner requested Drew to turn in his Communist Party membership book. Petitioner told Drew that "I want your card in order that the name may be changed, so as to protect you on your job against anything that may happen by the Government if they happen to out-

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[4] The Communist Party in New York City was divided into sections, located in the various assembly districts. At the head of a section is a section organizer, who has an executive secretary, executive educational director and executive daily worker manager. Each section also has an executive committee. A section is composed of many groups. The offices in the subdivisions are comparable to the offices in the section. Petitioner was a branch organizer—a leader of a branch—and a member of the section executive committee. He also held office as a section educational director (R. 101-102).

law the Communist Party and they would find out that you are a member, it would throw you out of your job." Drew surrendered his card to petitioner and the two then attended a Communist Party meeting (R. 99).

September 3, 1940: Drew attended a regular Branch meeting, at which petitioner presided. After the meeting had commenced, Appel, a section organizer, came in and took the floor. He told the members present that it was "control week" and that "all the membership books, papers and records in the Communist Party were going to be burned * * * so that there would be no record left to reveal his [the member's] identity or any of the records pertaining to the Party." Petitioner then resumed control of the meeting and called for a delegation to go to Congressman Ellenstein's home to protest the then pending draft legislation, it being understood that the protestors would do this as "citizens" and not "Communist members" (R. 100-101).

September 5, 1940: Drew attended an open air meeting presided over by petitioner. Petitioner opened the meeting by stating that the meeting was called by the Communist Party of the Sixth Assembly District. The meeting was concerned with steps to defeat the pending draft legislation. One of the speakers was petitioner's wife, who was introduced by petitioner as "Comrade Edith" (R. 102-103).

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September 16, 1940: Drew attended a regular Branch meeting of the Communist Party. In the course of the meeting petitioner came in and announced that he wanted to discuss with the Branch the question of expelling two comrades. Petitioner said that these two "were not participating as Communists, they did not canvass, they were afraid to circulate as Communists, and he felt they should be expelled" (R. 103-104).

October 14, 1940: Drew attended a regular Branch meeting of the Communist Party. This was after the enactment of the Selective Training and Service Act. During the meeting petitioner came in and asked to speak, stating that "now the young men in the Communist Party must get into the Army so that we can disintegrate the morale of the men in order that the Communists may take over; that we could do a big job in helping the men with their grievances, forcing their fights, and teaching them Communism. In this way we could soon overthrow the Capitalists and also take over control of the Army. We were to work on the officers as well as the men, and this job was especially assigned to young men of conscription age" (R. 104-105).

October 17, 1940: At petitioner's request, Drew joined him at local Party headquarters for the purpose of folding literature and cleaning the office. They each discussed their reasons for joining the Communist Party and in the course of the con-

versation petitioner said that he had also caused his wife to join the Party (R. 105-106).

November 20, 1940: Drew and Appel, the section organizer, were working at local Party headquarters burning records and literature when petitioner came in. Drew told petitioner that he and several other Negroes that had been Party members were organizing the National Negro Congress, and petitioner expressed satisfaction with the work that Drew was doing (R. 106-107).

November 25, 1940: Drew attended the regular Branch meeting of the Party, at which petitioner was present (R. 107).

December 2, 1940: Drew attended a regular Branch meeting of the Communist Party. At the meeting, petitioner advocated an increase in their activities in recruiting new members and announced "a general functionary's meeting to be held for the purpose of receiving the report" on the recent Communist Party convention (R. 107-108).

December 9, 1940: Drew attended a regular Branch meeting, at which petitioner exhorted those present to sell more copies of the Daily Worker and the Sunday Worker and to stir up opposition to the Smith-Connally Bill, which was then pending in Congress, on the ground that the bill would outlaw strikes and thus was against the principles of the Communists (R. 109-110).

December 16, 1940: Drew attended a regular

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Branch meeting, at which petitioner presided. Those present were instructed on how to prepare leaflets and to duplicate them (R. 111).

January 31, 1941: Petitioner and Drew were present at a social affair of the National Negro Congress. Drew introduced petitioner to those present as Tony Whales, a member of the Communist Party (R. 111).

February 11, 1941: At a meeting at local Party headquarters, petitioner introduced Drew to one Daniels, a new section organizer. Drew discussed his work with the National Negro Congress, and petitioner counselled him in steps to be taken in the future, assuring Drew that the Communist Party "would be back of us and would give us all their assistance" (R. 111-112).

February 22, 1941: Drew met with members of the Communist Party Section Executive Committee composed of petitioner and three others. Drew discussed the National Negro Congress. Petitioner, as Section Educational Director of the Communist Party, was assigned to assist Drew in preparing literature for the National Negro Congress, and it was agreed at the meeting that the Communist Party's office and machines were to be used for this purpose. Following the meeting petitioner and Drew prepared a leaflet "about discrimination" (R. 113).

February 28, 1941: Drew went to petitioner's home to obtain certain leaflets and observed a Com-

munist Party meeting taking place at the time (R. 114).

March 18, 1941: Drew attended a meeting of the National Negro Congress at which petitioner, one Louis Harper (see, *infra,* pp. 17-18) and Drew spoke. Petitioner was introduced to the gathering as Tony Whales (R. 114-115).

April 3, 1941: Drew called and attended a meeting of all Communist Party members in the National Negro Congress and "progressives from other organizations." Petitioner told those present that he could not remain at the meeting, but announced that Louis Harper (see *infra,* pp. 17-18) was going to conduct a class for the Communist Party, with Negroes from the National Negro Congress and other organizations, and that he "wanted all the colored comrades to attend this class." Petitioner also stated that those present needed studying and education along "the party line" (R. 115-116).

April 4, 1941: Drew attended a meeting sponsored by the National Negro Congress. Petitioner delivered a political discussion, speaking about how many Communists were in this country at that time and stating that "we outnumbered the number of Communists in Russia during 1917 when the revolution took place"; that "now was the time for revolution"; and that "the Communists could have a revolution in this country." He also urged those in attendance to attend the class being con-

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ducted by Harper and to attend the Workers' School, for the betterment of their organization (R. 116).

May 28, 1941: A meeting was held at petitioner's home, at which members of the National Negro Congress met with the Section Executive Committee of the Communist Party. Petitioner, Drew and Harper were among those present. The meeting was concerned with the downfall of the National Negro Congress on the East Side and with plans for rebuilding the organization "without the visible aid of the Communist Party" (R. 116-117).

September 3, 1941: Drew talked with petitioner at Communist Party headquarters (R. 121).

September 22, 1941: Drew visited the home of one Mary Farnum for the purpose of attending a Communist Party Executive Committee meeting, which was cancelled. While he was there, petitioner brought leaflets to Farnum, stating that it was her responsibility to see that the comrades distributed them (R. 121-122).

Louis Harper, another government witness, gave testimony that substantiated important aspects of Drew's testimony. Harper was a regular member of the Communist Party from 1932 to 1938 and attended some meetings thereafter (R. 71, 73, 78). He met petitioner in 1940 and knew him as Tony Whales (R. 72). Later Harper came to know petitioner as Carl Marzani, as a result of their membership in two other organizations (R.

72). He attended a meeting of the Communist Party at which petitioner and "Bill Easley" were present [7] (R. 73). Harper testified concerning activities on his part and on the part of Drew and petitioner in behalf of the National Negro Congress (R. 74-79), and that petitioner participated in those activities as a representative of the Communist Party (R. 77-78).

Another government witness, George Hewitt, was a member of the Communist Party from 1927 to 1944 (R. 255). In 1930 he went to Russia and remained there for about two years, during which time he attended the International Lenin School. The purpose of the schooling was "learning espionage"; learning how to become "professional revolutionists"; and learning "theory that would ultimately lead to the overthrow of the United States Government" (R. 255). In 1940 Hewitt was a teacher in the Communist Party's Workers School (R. 256). He used the name "Tim Holmes" to conceal his identity (R. 256). Detective Drew, using the pseudonym of "Bill Easley," was a student in the school (R. 256). Through Drew, Hewitt met petitioner in 1940 and knew him as Tony Whales (R. 257), the Educational Director of a section of the Communist Party (R. 257-258). Hewitt met petitioner a second time at the State Headquarters of the Communist Party in New

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[7] Harper did not know until the time of the trial that "Bill Easley" was in fact Detective Drew (R. 73).

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York City, at an educational organizer's meeting (R. 260-261).

In the course of his testimony for the defense, petitioner admitted knowing Harper (R. 185), but denied ever having known Hewitt or Detective Drew (R. 193). On cross-examination, he admitted that he signed and was active in securing signatures on a petition for the nomination of Earl Browder on the Communist Party ticket, as a candidate for representative in Congress, at an election that was held on February 6, 1940 (R. 218-221; see also R. 222-228).

SUMMARY OF ARGUMENT

I

The court below erroneously held that the first nine counts, relating to offenses committed more than three years before the indictment was filed, were barred by the statute of limitations. Congress suspended the running of the statute of limitations for any offense against the laws of the United States "involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner." Act of August 24, 1942, as amended (18 U.S.C. [1946 ed.] 590a). The offenses here involved the defrauding of the United States because they involved the wilful making of false and fraudulent statements to the United States. This was an interference by deception with the lawful functioning of a department of the United States and was a

fraud on the United States within the concept of fraud recognized in *Haas* v. *Henkel*, 216 U.S. 462, 479-480; *Hammerschmidt* v. *United States*, 265 U.S. 182, 188; and *United States* v. *Gilliland*, 312 U.S. 86. The Second Circuit has so held in a comparable case. *United States* v. *Gottfried*, 165 F. 2d 360, 367-368, certiorari denied, 333 U.S. 860.

The view of the court below that the statute suspending the running of the period of limitations reaches only that fraud which causes financial or property loss to the Government finds no support in the cases of *Noveck* (271 U.S. 201), *McElvain* (272 U.S. 633), and *Scharton* (285 U.S. 518). In none of those cases did this Court hold that financial loss is a necessary element of fraud in the sense in which it was used in the statute. The Court held only that it must be shown that fraud is a specific ingredient of the offense. It is such an ingredient here. For, as the trial judge charged the jury (R. 41), the statute punishes falsity only where there is "a deliberately-planned purpose and intent to deceive and thereby gain an unlawful advantage."

The legislative history of the Suspension Act refutes the concept that Congress suspended the running of the period of limitations for fraud involving money or property, but not for fraud involving interference by deception with the lawful functioning of a department of the Government. The legislative materials show that Congress was

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intent on reaching all fraud and, more specifically, that Congress had Section 35A of the Criminal Code in mind when it used the language of the Suspension Act now in question.

II

Assuming, *arguendo,* that only counts 10 and 11 are valid, there was no prejudicial error in the reception of evidence. The evidence in support of the first nine counts showing that petitioner had been an active member of the Communist Party and had used the name "Tony Whales" was relevant to show the falsity of petitioner's statements, involved in counts 10 and 11, that he had never been a member of the Communist Party and had never been known as "Tony Whales." The evidence as to the making of the nine statements involved in the first nine counts was admissible to show, as the jury was required to find, that petitioner had a deliberately-planned purpose to deceive and thereby to gain an unlawful advantage. Evidence of the making of the earlier statements convincingly demonstrated petitioner's plan and negatived the possibility that the two statements involved in counts 10 and 11 were innocently made as the result of misapprehension; it proved that the statements were wilfully false and fraudulent. The fact that some of the evidence might have disclosed the commission of other crimes does not detract from its admissibility if it was otherwise

competent. *Moore* v. *United States,* 150 U.S. 57, 61.

Petitioner's contention that the general sentence is invalid because it was based on the assumption by the trial judge that all eleven counts were valid is foreclosed by the decision in *Pinkerton* v. *United States,* 328 U.S. 640, 641-642. There, this Court held, following a long and well-settled line of cases, that a general sentence, which was within the maximum allowable on any one count, was valid if it was supported by any good count. In this case the sentence of imprisonment for a term of from one to three years was well within the permissible maximum of ten years' imprisonment, and can thus be supported by any valid count.

III

There is no merit to petitioner's claim that he could not know from the words of Section 35A of the Criminal Code that his willfully false and fraudulent statements were punishable because the statutory words "in any matter within the jurisdiction of any department or agency of the United States" are too vague and indefinite. This Court recently read the words as meaning in any matter within the authorized functions of the department. *United States* v. *Gilliland,* 312 U.S. 86, 93. This is the natural import of the words in their setting. Petitioner could not conceivably have failed to know that the question of accepting

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his resignation from office in the Department of State was a matter within that Department's authorized functions. Indeed, his request for a conference with the official responsible for security matters in order to persuade him to withdraw the request for his resignation demonstrates that petitioner well knew what he now claims he could not know. A deliberate plan to deceive in order to obtain an unlawful advantage, which the jury found, is incompatible with the present claim of surprised innocence.

IV

The contention that the trial judge denied petitioner a fair trial because he excluded competent evidence solely because of the supposed inability of the predominantly Negro jury in the case to weigh such evidence objectively must fail for lack of support in the record. The record clearly demonstrates that the trial judge never announced any such criterion for testing the admissibility of evidence; that petitioner never objected to any ruling on the ground that such a test was being applied; and that, as the court below found, the rulings of the trial judge were correct.

ARGUMENT

Of the three contentions argued by petitioner in the petition for a writ of certiorari, the first two stem from the circumstance that the court below determined that the statute suspending the running

of the statute of limitations for offenses involving the defrauding of the United States or any of its agencies does not apply to the offenses involved in this case, and that the first nine counts of the indictment—involving false and fraudulent statements during the period from July 29, 1942 to April 20, 1943[8]—were therefore barred by the normal three year period of limitations.[9] For the reasons set forth below under Point I, we think it clear that the court below erred in its construction of the suspension statute. If the Court agrees with our position on this question, there is no necessity for any decision on the constitutional question and the question of error in the admission of evidence which petitioner urges. Accordingly, we turn first to the question of the statute of limitations, and then, assuming *arguendo* that our position on that question is not accepted by the Court, we answer the constitutional contention and the question of allegedly prejudicial error, as well as the other matters urged by petitioner.

I

False and fraudulent statements willfully made to a government agency in a matter within its jurisdiction constitute offenses involving the "defrauding" of the United States, and the running of the statute of limitations was suspended as to those offenses.

A. *The Government has standing to urge the question in this Court.*—Inasmuch as petitioner

[8] The indictment was returned January 17, 1947 (see R. 273).

[9] See 18 U.S.C. [1946 ed] 582.

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was sentenced generally on the eleven counts on which he was convicted (R. 47), the Court of Appeals affirmed the judgment of conviction, notwithstanding that it determined that nine of the counts had been barred by the statute of limitations. We disagreed with the opinion below on the limitations issue,[10] but since the judgment itself was affirmed *in toto*, there was no occasion to seek review by this Court of the limitations problem. The case now is before the Court on petitioner's contentions that the judgment of conviction should be reversed. The Government, on the other hand, seeks to support the judgment. Since the United States is not seeking to enlarge its rights under the judgment, it is entitled to assert the limitations question as an independent basis for supporting that judgment. *United States* v. *Ballard*, 322 U.S. 78, 88; *United States* v. *American Ry. Exp. Co.*, 265 U.S. 425, 435-436; *Stelos Co.* v. *Hosiery Corp.*, 295 U.S. 237, 238-239; *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 548.

B. *The decision of the Court of Appeals on this issue is inconsistent with the plain language of the statutes involved and is not compatible with the congressional purpose evidenced by the legislative materials.*—1. Each count of the indictment rests on that clause of Section 35A of the Criminal Code which interdicted the wilful making of "any false

[10] See the expression of our views in our brief in opposition in *Gottfried* v. *United States*, No. 561, Oct. T. 1947, pp. 25-35; and see, too, pp. 18-19 of our brief in opposition in this case.

or fraudulent statements or representations * * * in any matter within the jurisdiction of any department or agency of the United States * * *." This Court had occasion to consider fully the scope of the provision in *United States* v. *Gilliland*, 312 U.S. 86, 91-95. The statutory provision is intended, as the Court there noted (312 U.S. at 93), "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described." And it reaches false and fraudulent statements made under such circumstances even though they do not cause the Government pecuniary or property loss (312 U.S. at 93). Consistently with this construction of Section 35A, each count of the indictment alleges with appropriate specificity that petitioner wilfully made "a false and fraudulent statement and representation" in a matter within the jurisdiction of the agency to which it was made.

It is necessary to consider, together with the pertinent terms of Section 35A, the terms of the Act of August 24, 1942, as amended (*supra*, pp. 4-5), to which we shall refer as the Suspension Act. That Act suspends the running of the statutes of limitation for three categories of offenses, only the first of which is pertinent here, as follows:

> The running of any existing statute of limitations applicable to any offense against the

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> laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, or (3) committed in connection with the care and handling and disposal of property under the Surplus Property Act of 1944, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. * * *.[11]

It is plain from even a casual reading of both statutes that the critical words are almost identical. The Suspension Act refers to offenses involving "defrauding" the United States "whether by conspiracy or not" and "in any manner." The quoted phrases emphasize the breadth which Congress gave to the provision. By its terms the statute reaches offenses involving any manner of fraud on the Government.

And Section 35A describes such an offense. The

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[11] The termination of hostilities was proclaimed by the President on December 31, 1946 (12 Fed. Reg. 1), and the suspension period thus will end December 31, 1949.

pertinent clause strikes at the willful making of "false or fraudulent" statements and representations to an agency or department of the United States, and the indictment charges that petitioner's statements were willfully false and fraudulent. Certainly the making of false and fraudulent statements to a Department of the United States in a matter within its jurisdiction, which causes that Department to act otherwise than it would have acted if the statements had not been made, is a fraud on that Department (see *infra*, pp. 29, 41-42).[12] Such fraud is a violation of Section 35A, and it is equally the kind of offense to which the plain, broad language of the Suspension Act extends.

In his brief in the court below petitioner did not deny that the offense involved here is one of fraud on the Government in the lawful functioning of one of its departments, but he urged, in effect, that this is a broader concept of fraud than the Suspension Act contemplates.[13] It was his position that only the narrower concept of fraud, in the sense of causing property or pecuniary loss to the Government, was intended to be reached by the Suspension Act.

The difficulty with this position is that it squares neither with the words of the statute nor with the policy of Congress. Congress did not refer to de-

[12] See *Knauer* v. *United States*, 328 U.S. 654, 657: "Fraud connotes perjury, falsification, concealment, misrepresentation."

[13] See Brief for Appellant, pp. 18-20, 26-33, 37-38.

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frauding the Government of money or property. Nor did Congress refer merely to fraud, without indicating the breadth of meaning it intended that word to have. Instead, Congress used the broadest language imaginable and referred to defrauding the United States "in any manner" either by conspiracy or otherwise. It cannot be denied that the willful making of false and fraudulent statements to a department of the Government is a manner of fraud. The decision in *United States* v. *Gilliland,* 312 U.S. 86, demonstrates this. If any heed is to be given to the plain meaning of plain words, it would be difficult, if not indeed impossible, to conclude that "defrauding" "in any manner" means only that species of fraud which results in a pecuniary loss.

Apart from the plain words of the statute, we have great difficulty in believing that a Congress which was alert at the beginning of hostilities to protect the Government from fraud which might escape detection in the hurly-burly of war was concerned only with financial loss. Experienced legislators obviously were aware that the kind of fraud which interferes with the lawful functioning of a department of the Government very often carries consequences infinitely more serious than those involved in mere financial loss. It is not reasonable to assume that Congress was concerned only with money. There is no reason of policy why Congress would have intended to preserve the

Government's opportunity to prosecute for financial frauds, and not for other frauds. The necessity for additional time to investigate and prosecute is the same in either situation, and the evil certainly is no greater in the case of financial fraud than it is in the case of deceptive interference with the proper functioning of the agencies and departments of the Government. Only by disregarding some of the words of the statute and by attributing to Congress a lack of good judgment is it possible to narrow the Suspension Act in the manner contended for by petitioner.

The view which we urge is the position which Judge Learned Hand, speaking for the Second Circuit, recently adopted in a case involving a prosecution for making a false and fraudulent statement to a War Price and Rationing Board, in violation of Section 35A. *United States* v. *Gottfried,* 165 F. 2d 360, 367-368, certiorari denied, 333 U.S. 860, rehearing denied, 333 U.S. 883. See also *United States* v. *Agnew,* 6 F.R.D. 566 (E.D. Pa.). It is the view which gives the words of Congress their fair meaning, and gives Congress credit for having an interest in more than simply the dollars and cents of the daily treasury balance.

2. The legislative materials relating to the Suspension Act emphasize, we submit, the correctness of our view of the statute, and demonstrate that Congress had Section 35A specifically in mind when it legislated on this question. The statute

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was initially enacted as the Act of August 24, 1942, and provided—

> * * * That the running of any existing statute of limitations applicable to offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, shall be suspended until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate. * * *

Its purpose was to suspend for the period of the war the running of the statutes of limitation applicable to offenses involving the defrauding of the Government.[14] As the Committee Reports state, experience during the first World War showed that many offenses involving fraud on the Government were barred because they had not been discovered within time to prosecute during the three year period of limitations.[15] In the words of both Committee Reports—

> During normal times the present 3-year statute of limitations may afford the Department of Justice sufficient time to investigate, discover, and gather evidence to prosecute

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[14] H. Rep. No. 2051 and S. Rep. No. 1544, 77th Cong., 2d sess.

[15] In 1921 a proviso was added to the three year statute of limitations extending the period for six years for offenses involving fraud on the Government. Act of November 17, 1921, 42 Stat. 220. The extension was repealed in 1927. Act of December 27, 1927, 45 Stat. 51. See *infra*, pp. 38-40.

frauds against the Government. The United States, however, is engaged in a gigantic war program. Huge sums of money are being expended for materials and equipment in order to carry on the war successfully. Although steps have been taken to prevent and to prosecute frauds against the Government, it is recognized that in the varied dealings opportunities will no doubt be presented for unscrupulous persons to defraud the Government or some agency. These frauds may be difficult to discover as is often true of this type of offense and many of them may not come to light for some time to come. The law-enforcement branch of the Government is also busily engaged in its many duties, including the enforcement of the espionage, sabotage, and other laws.

Your committee is of the opinion that action should be taken at this time to extend the limitations statute so that frauds may be discovered and punished even after the termination of the present conflict, and to insure that the limitations statute will not operate, under stress of present-day events, for the protection of those who would defraud or attempt to defraud the United States.

It is of course a fair inference from the legislative materials that one of the motives of Congress in suspending the running of the statutes of limitations for fraud offenses was to strike at frauds stemming from the Government's huge military procurement program. But nothing suggests that

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Congress intended to or did limit the statute to such frauds. Instead Congress used sweeping words to reach all frauds, and subsequent legislative developments in connection with the statute demonstrate persuasively that broader intention.

The Act was first amended by the Contract Settlement Act of 1944, which provided in Section 19, the enforcement provision, as follows:

> (b) The first section of the Act of August 24, 1942 (56 Stat. 747; title 18, U.S.C., Supp. II, sec. 590a), is amended to read as follows:
>
> The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the

existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law.

* * * * *

(d) The provisions of section 35-A of the Criminal Code (18 U.S.C., sec. 80) [16] shall apply to any statement, representation, bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition made or used or caused to be made or used for any purpose under this Act or under any regulations pursuant to this Act.

* * * * *

House Report No. 1590, 78th Cong., 2d Sess., p. 28, explained these provisions as follows:

Subsection (b) amends the act of August 24, 1942 (56 Stat. 747). This amendment suspends until 3 years after the termination of hostilities the running of any existing statute of limitations applicable to any Federal offense involving fraud, against the United States or connected with the negotiation, procurement, award, performance, payment for interim financing, cancelation or other termination, or settlement of any war contract.

* * * * *

Subsection (d) deals with the criminal penalties for fraud. It makes clear that the provisions of section 35-A of the Criminal Code (18 U.S.C., sec. 80) also apply to any such

[16] The statute upon which the instant prosecution is founded.

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> statement, representation, or other document made or used or caused to be made or used for any purpose under the act. Section 35-A imposes criminal penalties up to $10,000 in fines and up to 10 years' imprisonment for fraudulent actions involving the Government.

Senate Report No. 836, 78th Cong., 2d sess., p. 5, similarly emphasizes the fact that the penalty provided by Section 35A is an important enforcement sanction.

The suspension of limitations provision was further broadened in the Surplus Property Act of 1944, 58 Stat. 781, to include any offense committed in connection with the care and handling and disposal of property under that Act. Senate Report No. 1057, 78th Cong., 2d sess., p. 14, points out that the enforcement provisions of the Act are in addition to "any other civil remedies which the United States may have and of such provisions of the Criminal Code as relate to *fraud* (18 U.S.C. sec. 80) [17] and conspiracy (18 U.S.C. sec. 83)." [Italics added.]

Two significant points are reflected by these legislative materials. First, the addition of clauses "(2)" and "(3)" to the Suspension Act relating specifically to offenses in connection with the procurement and disposition of war materials demonstrates that clause "(1)" was intended by Congress to include fraud offenses which were not war

[17] Section 35A of the Criminal Code, the provision involved in this case.

frauds, i.e., frauds in the procurement and disposition of war material. Otherwise it would have little, if any content. It is, we submit, the catch-all clause, which covers such fraud offenses as are not dealt with specifically in the latter two clauses.

The second important point is that Congress demonstrated its understanding of Section 35A as a fraud statute by specifically referring to it as such in the enforcement provisions of the Contract Settlement Act. The specific reference to Section 35A in Section 19(d) of the Contract Settlement Act plainly demonstrates that Congress intended this important substantive provision to have the benefit of the suspension of the period of limitations provision in Section 19(b). But if there were in the language of the statute any room for doubt, that doubt is entirely dispelled by the specific reference in the House Report, first to Section 19(b) as suspending the period of limitations for offenses involving "fraud," and second by the reference to Section 35A as providing criminal penalties for "fraud," and "for fraudulent actions involving the Government." It is not often that Congress specifically makes its intent so plain. The references on the floor of the House by sponsors of the legislation to the fact that Section 35A provides a criminal enforcement sanction for the Act (90 Cong. Rec. 6060) and to the fact that criminal and civil penalties are provided for "any fraudulent practices" (90 Cong. Rec. 6053) serve only to em-

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phasize that the members of Congress were familiar with Section 35A, and that there would have been little, if any, purpose in providing for the suspension of the limitations period if the suspension provisions were not intended to apply to the most important criminal sanction in the Act. Similarly, the legislative materials with reference to the Surplus Property Act emphasize that the Congress which suspended the limitations period for offenses involving fraud on the United States specifically regarded Section 35A as a "fraud" statute.

It is significant likewise that nothing in the legislative history even intimates that, in referring to Section 35A, Congress had in mind anything short of the entire provision, or suggests in any manner that Congress was concerned only with particular clauses of that section. For each of the clauses of Section 35A complements its companions in striking at various means of perpetrating frauds on the Government. There is in consequence not the slightest reason to suppose that Congress was not intent on all of those clauses being available to protect the Government from fraud.

3. The opinion of the Court of Appeals on this question did not refer to the legislative history of the Suspension Act. Nor does it appear that the Court of Appeals attempted independently to ascertain the plain meaning of the words of the statute. Instead, the court predicated its decision on this question on three decisions of this Court in-

volving similar statutes after the first World War, which it regarded as dispositive of the issue, notwithstanding that none of the three cases involved a prosecution for making false and fraudulent statements to a Government agency in violation of Section 35A of the Criminal Code.

As we have shown, *supra*, p. 31, in 1921 a proviso was added to R.S. 1044, the general criminal statute of limitations, to make the provision read as follows:

> No person shall be prosecuted, * * * for any offense * * * unless the indictment is found * * * within three years next after such offense shall have been committed: *Provided, however,* That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner * * * the period of limitation shall be six years.

The pertinent language of the foregoing proviso is identical with the language of the first clause of the present Suspension Act.

In *United States* v. *Noveck*, 271 U. S. 201, the defendant was indicted for perjury in making an income tax return, it being alleged that the perjury was committed for the purpose of defrauding the United States. Relying on the allegation of fraudulent purpose, the Government urged that the offense involved defrauding the United States and, therefore, that the six year period of limitations

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was applicable. This Court rejected the argument, pointing out that (271 U. S. at 203)—

> * * * the alleged purpose to defraud the United States is not an element of the crime defined in § 125 [perjury], on which the indictment is based. The allegation does not affect the charge; it need not be proved and may be rejected as mere surplusage.

Adopting what it later characterized as a strict construction of the proviso (see *United States* v. *McElvain*, 272 U. S. 633, 639), this Court held that the six year period of limitations applied only to offenses "in which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense." 271 U. S. at 203-204. Since the elements of the offense of perjury do not include fraud, the Court held that the prosecution was barred by the three-year period of limitations. Consistently with this view the Court subsequently held in *United States* v. *Scharton*, 285 U. S. 518,[18] a prosecution for attempting to evade taxes by falsely stating taxable income, that the longer period of limitations was not applicable because the specific offense charged did not include fraud as one of its ingredients. Similarly, *United States* v. *McElvain*, 272 U. S. 633, involved a conspiracy to defraud arising out of the making of a false tax return, and this Court held that none of the sub-

[18] The case involved a statute of limitations applicable to tax cases, which contained the same proviso as R.S. 1044.

stantive tax offenses for which the defendant could have been indicted were reached by the proviso extending the period of limitations, and that a conspiracy to commit any of these offenses likewise was not included either.

As an original proposition, there is much that could be said on the basis of the statutory language and congressional purpose against the narrow construction which the Court gave the 1921 proviso. We do not pause, however, to reargue the merits of these decisions of almost a quarter century ago, for even on the basis of the technical, rigid doctrine which the Court adopted, the offense of making a fraudulent statement to a department of the United States is still covered by the proviso.

The court below read the three decisions just discussed as holding, in effect, that the extended period of limitations applied only to offenses in which the Government suffered financial or property loss (see R. 275-276). We find no such limitation in any of those three decisions, and, so far as we have been able to ascertain, no other court has interpreted them in this manner. See e.g.,[19] *Bailey* v. *United States*, 13 F. 2d 325, 326 (C.C.A. 9); *Weinhandler* v. *United States*, 20 F. 2d 359, 360-361 (C.C.A. 2), certiorari denied, 275 U. S. 554; *Miller* v. *United*

[19] While some of the cited cases involved facts showing pecuniary loss to the Government, the significant feature of the cases is that none of the courts even referred to this as a relevant factor. The courts simply applied the rule of the *Noveck* case and determined whether fraud was an ingredient of the offense involved.

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States, 24 F. 2d 353, 360-361 (C.C.A. 2); *Falter* v. *United States,* 23 F. 2d 420, 425-426 (C.C.A. 2), certiorari denied, 277 U.S. 590; *In re Doyle,* 42 F. 2d 686, 691 (S.D.N.Y.), reversed without opinion, *sub nom. United States* v. *Doyle,* 47 F. 2d 1086 (C.C.A. 2). This Court determined only that, in order to construe the proviso as narrowly as possible, it would not be applied to any offense which did not specifically include fraud as one of its elements.

Here, however, the statute includes as an element of the offense the willful making of a fraudulent statement to the government in a matter within its jurisdiction, and the indictment charges that petitioner willfully made such fraudulent statements. Once it is recognized, as it must be, that the concept of fraud is not limited to pecuniary loss, there is no difficulty whatever in fitting the offense in question into the stringent requirement that the fraud must be "an ingredient under the statute defining the offense." *United States* v. *Noveck,* 271 U. S. at 204. For many years this Court has made it plain that a conspiracy to defraud the Government includes not only causing it pecuniary loss, but also includes interfering by deception or trickery with the lawful functioning of any department of the Government. *Haas* v. *Henkel,* 216 U. S. 462, 479-480, and cases cited; *Hammerschmidt* v. *United States,* 265 U. S. 182, 188; *United States* v. *Gilliland,* 312 U. S. 86, 92; *United States* v. *Bayer,* 331 U. S. 532,

533. The making of a false and fraudulent statement to a department of the Government upon which it acts is such an interference with the lawful functioning of that department. See *United States* v. *Gilliland*, 312 U. S. 86, 93.

It is not without significance in considering what Congress intended by its language in the present Suspension Act to recall that Congress did not stop to express disagreement with the narrow construction which this Court gave the predecessor statute. As this Court noted in *Braverman* v. *United States*, 317 U. S. 49, 54-55, Congress wrote specific provisions into the Revenue Act of 1932 for the express purpose of overcoming those decisions. It is less than reasonable to believe that in 1942 Congress wrote into legislation a construction which was so narrow that earlier legislation had already been enacted to overcome it. Yet the court below not only disposed of the present issue solely on the basis of this Court's earlier decisions and without discussion of the significant legislative materials, but also it did so on the basis of the narrowest possible reading of opinions which admittedly narrowly construed the statute in question.

4. In recommending passage of the Suspension Act in 1942, the House and Senate Committees laid great emphasis on the fact the war program made it likely that frauds on the Government could not be detected within the normal three-year period of limitations and that it was imperative that the

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Department of Justice be allowed ample time to uncover and prosecute such offenders (see *supra*, pp. 31-32). This is such a case. For three years petitioner flatly denied to various agencies of the Government that he had been a member of the Communist Party. And so he managed to remain on the State Department rolls in an important position. It was not until near the close of the shooting war that the New York Police Department was willing to open its security files, and it was still later until Detective Drew's evidence, which so convincingly demonstrates the falsity of petitioner's statements (see *supra*, pp. 9-17), became known to the Government and became available for use in a judicial proceeding (See R. 53, 67-68). But for the war, the evidence undoubtedly would have been known and available for use long before. It is precisely this kind of situation which led Congress to suspend the running of the statute of limitations for fraud on the United States. The will of Congress ought not to be disregarded by a grudgingly narrow construction of words which were used in their broadest sense to protect the Government.

II

Assuming *arguendo* that only counts 10 and 11 are valid, there was no prejudicial error in the reception of evidence, in the charge to the jury or in the sentence.

Having succeeded on appeal in obtaining the reversal of his conviction on the first nine counts on

the ground that they were barred by the statute of limitations, petitioner now urges that his conviction on the remaining two counts should also be set aside because evidence on the other counts was received at his trial and those other counts were submitted to the jury. If our position in Point I of the Argument is sound, there is, of course, no occasion to reach this contention. Assuming *arguendo*, however, that the Court should reject our argument on the statute of limitations, we shall show that the evidence involved under the first nine counts was properly admissible under counts 10 and 11, and that petitioner was not substantially prejudiced in any manner by the asserted error of the trial judge in overruling the plea in bar and thus permitting the first nine counts to be submitted to the jury.

A. *The submission of the allegations of the first nine counts to the jury did not prejudice petitioner.* —Petitioner's first ground for asserting prejudice in respect of the first nine counts is the contention that "The first nine counts contain specific allegations of prejudicial matter which are entirely lacking in the remaining two counts", and that if the trial count had dismissed the first nine counts, "none of these charges would have been included in the indictment or submitted to the jury" (Pet. 23, 24; see Br. 42-51). It is true, of course, that if the trial judge had sustained the plea in bar as to the first nine counts, the allegations would not have been submitted to the jury, but it does not at all follow

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that the fact that the jury had the complete indictment in any manner prejudiced petitioner. Consistently with the elementary premise that an indictment is a pleading and nothing more, the trial judge instructed the jury (R. 34) that—

> The fact that a defendant has been indicted and is charged with a crime is not in itself to be taken as an indication of guilt, and no inference is to be drawn against him from that fact, because an indictment is merely the machinery and the procedure that the law provides for bringing a defendant before the Court and placing him on trial. That is the only function of an indictment.

Petitioner accepted this instruction as a correct and adequate statement of the applicable principles of law; when the trial judge invited suggestions from counsel at the close of the charge, petitioner's counsel informed the court that he had only one point that he wanted to call to the court's attention, and that related to another matter (R. 43-44).

Particularly in the light of the above-quoted instruction, it is difficult to understand in what manner petitioner was prejudiced by the fact that the allegations of the first nine counts were before the jury. Assuming, as we must, that the jury understood and applied the court's instructions, it is plain that the jury treated the allegations of each count of the indictment only as a pleading, and that

the jurors looked to the evidence, not the pleadings, in performing their function.

Even apart from the fact that mere allegations in a pleading could not have prejudiced petitioner, his contention is without merit for another reason. As we shall show below, the evidence in support of the first nine counts was admissible in support of the last two counts. And if the evidence was properly before the jury, it necessarily follows that petitioner could not possibly have been prejudiced by the fact that the allegations which the evidence supported were also before the jury.

As an appendage to the contention under consideration, petitioner suggests that the trial judge should have instructed the jury that the allegations of counts III(e) and (h) and IV(e) and (h) had been abandoned by the Government (Br. 48-49).[20] The argument apparently is an after-thought made for the first time in this Court. Assuming that such an instruction would have been appropriate, petitioner did not object in the trial court to the omission of such an instruction to the jury and reference to his briefs in the court below discloses that the point was not made in that court. In these circum-

[20] The pertinent allegations are the same in both counts. Paragraph (e) alleged that petitioner contributed services to the Communist Party by counselling members and recruits of the Communist Party in the methods and means of infiltrating various groups for the purpose of creating Communist Front organizations (R. 6). Paragraph (h) alleged that he counselled Party members to sow resentment and discontent among Negroes by agitating the question of racial discrimination (R. 7).

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stances, it is plain that the contention is not open in this Court. See Rule 30, F. R. Crim. P.; compare *Ballard* v. *United States*, 329 U. S. 187, 190, 197-199. Indeed, in view of the action of the court below in setting aside the conviction on the first nine counts, petitioner, in any event, would have no standing in this Court to raise an issue concerning the sufficiency of the instructions to the jury on one of those counts. And even if this Court accepts our position in Point I of the Argument and sustains the validity of the first nine counts, the question is not open, for the judgment is supported by any one of the other counts. *Pinkerton* v. *United States*, 328 U. S. 640, 641-642; *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105.

B. *The fact that relevant evidence may possibly have disclosed other crimes is no basis for excluding it.* For his second ground petitioner urges that the court improperly admitted evidence to the effect that petitioner had called for revolution "now" and had counselled others to "infiltrate the armed forces, disintegrate their morale, take over the Army and overthrow the capitalists" (Pet. 25-26). He urges (Br. 52-53) that it was not shown at the trial that the Communist Party advocated any of these acts and thus that the evidence was not relevant on the question of his membership in the Communist Party. The short answer to the argument is supplied by the record, which discloses that each of the statements was made by petitioner in

the performance of his functions as an official of the Communist Party, and it was from the performance of these duties that the jury was entitled to infer membership in the Communist Party.

Thus, reference to pages 74-78 of the record (see Br. 58) shows that petitioner attended a meeting in New York of the National Negro Congress as a representative of the Communist Party. He addressed the group concerning the problems of the Negro people and assured the audience "that their struggles were struggles that the Communists were concerned with" (R. 75-76). At another meeting between representatives of the Negro Congress and local executives of the Communist Party, petitioner was present as a representative of the Communist Party (R. 76-78).

Pages 106-107 of the record, also referred to by petitioner (Br. 58), disclose that on November 20, 1940, petitioner met Detective Drew, who was engaged in burning old records of the Communist Party,[21] and in the course of their conversation petitioner commended him for his efforts in organizing the National Negro Congress with the aid of "several Negroes that had been Communist Party members" (R. 106). Similarly, reference to pages 112-113 of the record (see Br. 58) shows that petitioner introduced Detective Drew to the new section organizer of the Communist Party and as-

[21] Drew had infiltrated into the Communist Party in the performance of his duties as a member of the New York City Police force (see *supra*, pp. 9-10).

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sured Drew that "the Communist Party would be back of us [the National Negro Congress] and would give us all their assistance" (R. 112). Pages 115-117 of the record (See Br. 58) refer to three different meetings in which petitioner participated as an official of the Communist Party. At one meeting of the Communist Party members in the National Negro Congress, petitioner announced that one Harper, a Party member, would conduct a class for the Communist Party and that "he wanted all the colored comrades to attend this class" and that education "along the party line" would help the National Negro Congress (R. 115-116). At a second similar meeting petitioner gave "a political discussion" and (R. 116):

> spoke about how many Communists were in this country at this time, and he said that we outnumbered the number of Communists in Russia during 1917 when the revolution took place. He said that now was the time for revolution; that the Communists could have a revolution in this country.

The third meeting was between leading members of the National Negro Congress and officials of the Communist Party, including petitioner (R. 116-117). The subject of the meeting was the rebuilding of the National Negro Congress "without the visible aid of the Communist Party" (R. 117).

Petitioner's reference to page 104 of the record (See Br. 51-52) concerns a regular branch meeting

of the Communist Party on October 14, 1940. At this meeting, held shortly after the enactment of the Selective Training and Service Act, petitioner stated in addressing the group (R. 104)—

> * * * now the young men in the Communist Party must get into the Army so that we can disintegrate the morale of the men in order that the Communists may take over; that we could do a big job in helping the men with their grievances, forcing their fights, and teaching them Communism. In this way we could soon overthrow the capitalists and also take over control of the Army. * * *

The court below held—correctly, we believe—that this evidence was relevant to show the falsity of petitioner's statement that he had never been a member of the Communist Party (count 10) (R. 276). It does not aid petitioner to urge that there is no issue of purpose or intent in this case and, therefore, that the evidence was not admissible on this ground (Br. 54). For, while we disagree with petitioner's premise, that is not the basis for its admissibility. It is admissible to show that in 1940 and 1941 petitioner engaged in activities of the Communist Party and represented it as one of its officials. If the jury believed the evidence, and they did, it demonstrated quite convincingly that petitioner's denial that he ever had been a member of the Communist Party was an outright lie.

It is no answer to suggest, as petitioner does, that there "is no evidence whatsoever in this record as

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to the official advocacy by the Communist Party of revolution 'now' the infiltration of the Army to overthrow the capitalists or the sowing of resentment and discontent among Negroes" (Br. 14; see also Br. 52-53). The evidence in question shows that each of the statements was made either at a Communist Party meeting, or at a meeting of officials of the Party and the National Negro Congress, or at a meeting which petitioner attended as a representative of the Communist Party. Petitioner's statements were probative on the issue of his membership in the Communist Party because they were made by him while acting as an official of the Communist Party. The issue was not whether the Communist Party advocated revolution now or the sowing of discontent among Negroes; it was whether petitioner had willfully perpetrated a fraud on the Government by denying that he had been a member of the Communist Party.[22] And the evidence in question is plainly related to that issue.

Petitioner also urges that evidence of his statements such as the call for revolution "now" was evidence of other criminal offenses (Br. 12-13, 53-54) which substantially prejudiced him. But if, as we submit, the evidence was relevant to the issue of petitioner's membership in the Communist Party, its admissibility is in no way affected by the fact

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[22] Thus, the trial judge instructed the jury (R. 42) that the Communist Party was not on trial, and that their sole concern was whether petitioner had violated Section 35A in the manner charged in the indictment.

that it might also disclose other offenses.[23] As this Court said in *Moore* v. *United States,* 150 U. S. 57, 61, the fact that testimony also has a tendency to show the commission of another crime is not sufficient to exclude it if it is otherwise competent. See also, *United States* v. *Krulewitch,* 145 F. 2d 76, 80 (C.C.A. 2); *Bracey* v. *United States,* 142 F. 2d 85, 88 (App. D. C.), certiorari denied, 322 U. S. 762; *Troutman* v. *United States,* 100 F. 2d 628, 633 (C.C.A. 10); *Astwood* v. *United States,* 1 F. 2d 639, 642 (C.C.A. 8); *Schwartz* v. *United States,* 160 F. 2d 718, 720-721 (C.C.A. 9); 1 Wigmore, *Evidence* (3rd ed. 1940), §§215-218.

C. *Evidence of the making of the statements involved in the first nine counts was admissible to explain the circumstances of the making of the statements involved in counts 10 and 11 and to show that petitioner acted willfully in making the latter false and fraudulent statements.*—On the theory on which the case was tried, there necessarily was evidence showing the making of the statement involved in each count. By petitioner's characterization (Br. 61), some of the statements involved in the first nine counts were the same, others were similar, and others were different from

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[23] If petitioner's view were sound, he would be able to exclude the evidence from this case on the ground that it discloses other offenses and then keep it out of prosecutions for the other offenses on the ground that it would show that he committed the offenses involved in this case.

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the statements involved in counts 10 and 11.[24] Inasmuch as the court below held that the plea in bar should have been sustained as to the first nine counts, petitioner now urges that it was prejudicial error to admit evidence of the making of the first nine statements. The court below agreed that it was error, but held that the error was harmless, because evidence of the statements disclosed that petitioner had consistently and steadfastly denied any association with the Communist Party and had always maintained the position which he asserted at the trial (R. 276-277). In this sense, said the court, the admission of the evidence was beneficial rather than hurtful to petitioner.

In our view, there is no occasion to concede that the evidence was erroneously admitted. We believe that evidence of the making of the statements was admissible to show the scheme or plan pursuant to which the statements involved in counts 10 and 11 were made, and to show that those statements

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[24] Count 10 involved petitioner's statement denying that he ever had been a member of the Communist Party. The same statement, made at different times, is involved in counts 1 and 6. Count 11 involved the statement that petitioner had never used the name "Tony Whales," and the same statement, made at other times, is the subject of counts 5 and 8. Count 2 alleged that petitioner falsely stated that he had never attended any meetings of the Communist Party; count 3, that he had never contributed his services to the Communist Party; count 4, that he had never participated in any of the activities of the Communist Party; counts 7 and 9 that he never made any speeches against conscription.

were willfully false and fraudulent.[25] It is evident from the evidence summarized in the Statement that all of the false statements stemmed from petitioner's preconceived plan to obtain a position in agencies and departments of the Government without disclosing the fact that he had been a member of the Communist Party. Consistently with that plan, petitioner obtained employment subject to a character investigation, and he retained that employment by categorically denying, whenever inquiry was made, that he ever had been a member of the Communist Party or that he ever had used the name "Tony Whales." The circumstances of the making of the statements involved in the first nine counts were necessary background evidence in order that the statements made in counts 10 and 11 might be understood in their proper context.

Similarly, evidence showing the making of the same and similar statements in earlier inquiries was strong evidence in support of the Government's theory that the false and fraudulent statements involved in Counts 10 and 11 were made willfully and not as the result of misunderstanding or inadvertence. Petitioner's suggestion that the evidence could not be material to the issue of intent because Section 35A requires no specific intent is answered, we believe, by the express requirement in the statute that only false and fraudulent state-

[25] If in fact the evidence was admissible, it does not matter that the trial judge may have had a different reason for admitting it.

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ments which are willfully made are punishable, and by the theory on which the case was submitted to the jury, a theory in which petitioner concurred in the trial court. Thus, the trial judge instructed the jury (R. 43):

> It is incumbent upon the Government, as I have heretofore said to you, to prove all the essential elements of the crime charged. Briefly, these elements are:
>
> 1. That the defendant made the statements charged.
>
> 2. That the statements were false.
>
> 3. That the false statements were made willfully, knowingly, and fraudulently.
>
> If you believe that the prosecution has proved all of these elements, beyond a reasonable doubt, then you must find the defendant "Guilty."
>
> If, on the other hand, you believe the Government has not proved any one or more of these elements, beyond a reasonable doubt, you must find the defendant "Not Guilty."
>
> This is true as to each and every count of the indictment.

And in defining the necessary criminal intent required by Section 35A, the trial judge told the jury (R. 41):

> * * * We must give the term "fraudulent" the meaning the law gives to it, to wit, *a deliberately-planned purpose and intent to deceive and thereby gain an unlawful advantage.* As you know, one cannot see into the mind of

> another human being to ascertain his intentions—they can only be gathered from his words and deeds. Intent is an illusive or abstract thing capable of being understood, as I have said, only as a result of observing one's actions or hearing one's utterances. "Intent" as applicable to this case must be found from the evidence here presented, in the light of all of the circumstances under which the act or acts occurred or statements were made. [Italics added.]

It was this theory on which the case was tried in the district court, and having agreed to it in that court, petitioner, of course, may not now urge a different theory eliminating the element of intent as one of the ingredients of the offense. *Johnson* v. *United States,* 318 U. S. 189, 200-201.

Tested in the light of the requirement that the Government was obliged to prove as to counts 10 and 11 that petitioner had "a deliberately-planned purpose and intent to deceive and thereby gain an unlawful advantage," it is evident that testimony concerning the making of the first nine statements was extremely important to show that the statements involved in counts 10 and 11 were made with the requisite illegal intent. It might have been possible for petitioner to explain away the statements involved in counts 10 and 11 as having been made in an informal context and without petitioner's intending to deceive the State Department to obtain an unlawful advantage. But evidence show-

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ing that the statements in question were made by petitioner as a further step in his plan to deceive the Government, and that related statements previously had similarly been made, removed the basis for any claim of innocent purpose and demonstrated petitioner's purpose to deceive the Government in its full nakedness.

There is no area for disagreement among the parties over the settled principle that such evidence is admissible for the purpose we have shown, notwithstanding that proof of the making of the nine statements also was proof, in part, of the commission of nine legally separate, but related, offenses. The rule often has been recognized by this Court. *Glasser* v. *United States,* 315 U.S. 60, 80, 81-82; *Lisenba* v. *California,* 314 U.S. 219, 227; *Moore* v. *United States,* 150 U.S. 57, 61; *Williamson* v. *United States,* 207 U.S. 425, 450-451; *Allis* v. *United States,* 155 U.S. 117, 119; *Wood* v. *United States,* 16 Pet. 342, 360. And it regularly has been recognized in the lower federal courts. See, e.g., *Bracey* v. *United States,* 142 F. 2d 85, 87-88 (App. D.C.), certiorari denied, 322 U.S. 762; *Borum* v. *United States,* 56 F. 2d 301, 302-303 (App. D.C.); *Hatem* v. *United States,* 42 F. 2d 40, 41 (C.C.A. 4); *Morris* v. *United States,* 112 F. 2d 522, 527-528 (C.C.A. 5); *Kettenbach* v. *United States,* 202 Fed. 377, 383-384 (C.C.A. 9), certiorari denied, 229 U.S. 613; *Bacon* v. *United States,* 97 Fed. 35, 41-42 (C.C.A. 8); 1 Wigmore, *Evidence* (3rd ed. 1940), §§ 215-218; 2 *id.,* §§ 304-307, 321-324.

It is true that if the evidence in question had been admitted on the theory which we urge, petitioner would have been entitled to request that the jury be instructed to consider the evidence only on the issue of petitioner's purpose and intent. But the absence of such an instruction here could not have substantially prejudiced petitioner, for the evidence had no bearing and cast no light on any other issue in the case. Thus, for example, evidence that petitioner had denied membership in the Communist Party, that he had denied using the name "Tony Whales," or that he had denied performing services for the Communist Party gave the jury no information concerning the truth of the denials or concerning the undisputed fact that petitioner did make the statements involved in counts 10 and 11. Its sole significance related to the intent question, concerning which the jury had full instructions (see *supra*, pp. 55-56). In these circumstances, where the evidence in question gave information to the jury which, from its nature, could only aid the jury on the intent issue, the suggested instruction would have given petitioner no additional protection. We submit that petitioner could not have been prejudiced by the absence of a formal instruction requiring the jury to limit consideration of the evidence to that issue. See *Kotteakos* v. *United States*, 328 U.S. 750.

D. *The validity of any count is sufficient to support the general sentence.* The maximum punish-

ment prescribed for violation of Section 35A was a term of imprisonment for 10 years, a fine of $10,000, or both (*supra*, pp. 3-4).[26] The jury specifically found petitioner guilty on all 11 counts (R. 45-46), and the trial judge imposed a general sentence of imprisonment for a term of from one to three years (R. 47), a term well within the maximum permissible for any one count. Petitioner now urges that the sentence is invalid, inasmuch as the conviction on nine of the eleven counts was reversed by the court below. In making the argument, he recognizes the long-established rule of *Claassen* v. *United States*, 142 U. S. 140, 146-147, that—

> * * * it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only.

But he urges that the presumption is rebutted in this case on the theory that the trial court thought that each of the eleven counts charged a separate offense and therefore "must necessarily

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[26] The new Criminal Code has reduced the maximum term of imprisonment to five years. See 18 U.S.C. 1001.

have imposed its general sentence on the basis of eleven separate convictions" (Br. 74).

The difficulty with petitioner's argument is that the situation here is no different from that in the *Claassen* case. There, the trial judge imposed a general sentence after the jury had convicted the defendant on five counts, and this Court declined to review contentions relating to four of the counts because the Court determined that one count was unassailable.[27] If, as the Court held, the presumption that the sentence was imposed on the valid count was not rebutted there, it equally has not been rebutted here.

There is no need to labor the point, for the precise situation presented by this case was recently before this Court in *Pinkerton* v. *United States*, 328 U.S. 640, 641-642, and the *Claassen* rule

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[27] Petitioner misplaces his reliance on the statement in the *Claassen* opinion that the situation is different where there is a general verdict and the jury has been erroneously instructed as to one count. A different rule applies there because it is not possible to know from the general verdict whether the jury convicted on any count other than the count concerning which an erroneous instruction was given. For illustrations of the application of the rule in a slightly different context, see *Cramer* v. *United States*, 325 U.S. 1, 36, n. 45; *Haupt* v. *United States*, 330 U. S. 631, 641, n. 1. Here, however, as in the *Claasen* case (142 U.S. at 147), the verdict was not general and hence, the rule could have no application. So long as there is one count which is unassailable, the sentence is not open to attack.

The reported opinion in *Dwyer* v. *United States*, 170 Fed. 160, 166 (C.C.A. 9), relied upon by petitioner, does not disclose whether the jury's verdict was general. If it was, the decision is consistent with the decisions of this Court. If the verdict was not general, then the decision is obviously erroneous.

was held to be applicable. The Pinkertons were convicted on several substantive counts and were given general sentences, which did not exceed the maximum sentence allowable under any one count (328 U.S. at 641-642). The situation is the same here. In the trial court the Pinkertons demurred to various of the charges against them on the ground that they were barred by the statute of limitations (No. 719, Oct. T. 1945, R. 13-15). The demurrer was overruled (*ibid.*, R. 25-26), but on appeal, the circuit court of appeals held that the demurrer should have been sustained as to certain counts because they were barred by the statute of limitations. Since, however, each of the remaining substantive counts supported the general sentence, the judgment was affirmed. See *Pinkerton* v. *United States*, 151 F. 2d 499, 500-501 (C.C.A. 5). In this Court, the Pinkertons raised the question whether the reversal of their conviction on some of the counts invalidated their general sentence (Pet. 2, No. 719, Oct. T. 1945). This Court considered the problem and held that the "settled law" of the *Claassen* case controlled (328 U.S. at 642).

The present case is not distinguishable from the *Pinkerton* case. Here, as there, a challenge to the validity of some of the counts of the indictment on the ground that they were barred by the statute of limitations was rejected by the trial court. Here, as there, the trial court was reversed by the Court of Appeals. In both cases the appellate

court applied the rule of the *Claassen* case and affirmed the sentence, notwithstanding the reversal as to some counts. This Court agreed with that disposition in the *Pinkerton* case. We submit that the same result must be reached here.[28]

Significantly, if petitioner believes, as he argues (Br. 75), that the same sentence would not have been imposed if only the last two counts had been in the case, he has a remedy available in the trial court. If the judgment is affirmed by this Court, he may within 60 days apply to the trial court for a reduction in sentence, as is permitted by Rule 35 of the Federal Rules of Criminal Procedure. By adhering to this procedure, petitioner will afford the trial judge an opportunity to make plain whether the sentence is more severe than it would have been if the first nine counts had not been in the case.

III

Petitioner had ample basis for knowing that the willfully false and fraudulent statements involved in counts 10 and 11 were within the proscription of Section 35A of the Criminal Code.

As we have shown in the Statement, *supra,* pp. 7-8, in the spring of 1946, Mr. Panuch, the then Deputy Assistant Secretary of State for Administration, requested through a subordinate that petitioner voluntarily submit his resignation from the

[28] See *Hirabayashi* v. *United States,* 320 U.S. 81, 85, 105, involving the same result in dealing with concurrent sentences, rather than a general sentence.

Department, for security reasons (R. 47-49). Petitioner met the request with the statement that he would take the matter up with the Office of the Assistant Secretary of State for Administration, and he then requested a conference with Mr. Panuch of that office, for the purpose of discussing the request for his resignation (R. 47-48). The conference was held on June 1, 1946, in Mr. Panuch's office and was opened by a statement to petitioner of the "substantial" security reasons underlying the request for his resignation. Mr. Panuch testified that he stated that the charges were as follows: (R. 49):

> * * * that you were a Communist, a member of the Communist Party in 1940 and 1941, and that you were a Communist organizer; that you operated in front organizations in New York. * * * That you operated under the alias of Tony Whales; that your wife was a member of the Communist Party and that her Communist Party name was Edith Charles; that you opposed conscription; that you made a false statement with respect to your financial resources to get a job with W.P.A., and that statement was made under oath; and that you signed a petition as a member of the Communist Party for the * * * election of Earl Browder as Congressman.

Petitioner denied that he ever had been a member of the Communist Party (count 10) or that he ever had been known as "Tony Whales" (count

11), and he either denied or explained away the other "charges" (R. 50). And to support his denials, he directed Mr. Panuch's attention to the prior proceedings before the Civil Service Commission (R. 51) (see *supra*, pp. 6-7). The conference lasted over two hours and involved a complete consideration of the problem under discussion. In explaining the nature of the proceeding, Mr. Panuch testified that "it was in the nature of an appeal" from the request for petitioner's resignation (R. 52). Following this conference, Mr. Panuch informed petitioner that he could remain with the Department (R. 59).

Petitioner now contends that to hold him criminally responsible for false and fraudulent statements which he willfully made at the proceeding before Mr. Panuch is to deny him his rights under the Fifth and Sixth Amendments to the Constitution. As we understand his argument, it is that as applied to this case, Section 35A is unconstitutionally vague and indefinite because it was not possible for him to know that his willfully false and fraudulent statements were made, as the statute provides, "in any matter within the jurisdiction of any department or agency of the United States." And in support of the contention he argues that the statements were made in a voluntary conference; that he was not under oath; that they were not stenographically transcribed; and that they were not made pursuant to any law or regulation.

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As a preliminary to considering this contention, it is important to note that there is no dispute among the parties that the statements involved in counts 10 and 11 were made under the circumstances alleged in the indictment. Nor is there any question in this Court that the jury was justified in finding that they were willfully false and fraudulent. Petitioner's only point is that he was unable to know from Section 35A that such willful falsification was subject to criminal penalties.

The language and legislative history of the pertinent clause of Section 35A was fully considered by this Court in *United States* v. *Gilliland*, 312 U.S. 86. And so, like petitioner, we start with the opinion in that case. There, the Court concluded (312 U.S. at 93)—

> The statute was made to embrace false and fraudulent statements or representations where these were knowingly and willfully used in documents or affidavits "in any matter within the jurisdiction of any department or agency of the United States." In this, there was no restriction to cases involving pecuniary or property loss to the government. The amendment indicated the congressional intent to protect *the authorized functions of governmental departments and agencies* from the perversion which might result from the deceptive practices described. [Italics added.]

Thus, the Court read the statutory language "in any matter within the jurisdiction" of a depart-

ment as meaning in any matter involving the "authorized functions" of the department in question. And this, in substance, is the meaning which the lower federal courts have given the quoted language.[29]

No one, we believe, could have any difficulty in understanding from the face of the statute that the crucial words "in any matter within the jurisdiction" of a department comprehend those matters which are within the authorized functions of the department. For that is the natural import of the words in their setting. Compare *United States* v. *Birdsall*, 233 U.S. 223, 230-231. Whatever uncertainty there may be in the application of the statute stems from the fact that conceivably there are some situations in which one could not know with certainty whether a given matter is within the authorized functions of a given department or agency.[30] These are the borderline situations which invariably arise in the application of criminal statutes. But whatever possible uncertainties

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[29] See *United States* v. *Mellon*, 96 F. 2d 462, 463 (C.C.A. 2), certiorari denied, 304 U.S. 586; *United States* v. *Zavala*, 139 F. 2d 830, 831-832 (C.C.A. 2); *Spivey* v. *United States*, 109 F. 2d 181, 184-185 (C.C.A. 5), certiorari denied, 310 U.S. 631; *United States* v. *White*, 69 F. Supp. 562, 564 (S.D. Calif.); *United States* v. *Sanders*, 42 F. Supp. 436, 439 (S.D. Tex.); see also *United States* v. *Heine*, 149 F. 2d 485, 487 (C.C.A. 2), certiorari denied, 325 U.S. 885; *United States* v. *Schneider*, 45 F. Supp. 848, 851 (E. D. Wis.).

[30] Cf., e.g., *Terry* v. *United States*, 131 F. 2d 40, 43-44 (C.C.A. 8), with *United States* v. *Mellon*, 96 F. 2d 462, 463 (C.C.A. 2), certiorari denied, 304 U.S. 586; and *United States* v. *Crittenden*, 24 F. Supp. 84, 88 (W.D. N.Y.), with *United States* v. *Sanders*, 42 F. Supp. 436, 439-440 (S.D. Tex.).

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there are in such cases need not trouble us here, for this is not a borderline case. See *United States* v. *Petrillo*, 332 U.S. 1, 5-8; *Robinson* v. *United States*, 324 U.S. 282, 285-286.

The words of the statute told petitioner that if he willfully gave false information to the State Department in a matter concerning which it had power to act, he would be subject to criminal prosecution. As an employee of the State Department, petitioner could not avoid knowing that his employment status was a matter on which the Department had authority to take action. He was chargeable with knowledge that he could be removed for cause,[31] or transferred to another position if the Secretary of State determined that such a transfer was necessary.[32] A mind intent on knowing could not have failed to realize that the less drastic step of accepting a requested resignation of an employee likewise is an authorized function of the Department. That petitioner did realize this is demonstrated by the very fact that he sought action from the Office of the Assistant Secretary of State for Administration and obtained it, favorably to himself. It is impossible, we submit, to reconcile petitioner's request for the conference with his present contention that he could not know that his conference with Mr. Panuch was on a mat-

[31] Act of August 24, 1912, 32 Stat. 555, Section 6 (5 U.S.C. 652). See also Rule XII, Rules of the Civil Service Commission, 5 C.F.R. 449-452.

[32] Act of June 20, 1874, 18 Stat. 90, Section 1, as amended (5 U.S.C. 154).

ter within the jurisdiction of the State Department.

Petitioner suggests that, unlike the situation in the *Gilliland* case, *supra*, 312 U.S. at 91, there were no regulations here which informed him of the information required of him and of the penalty for furnishing willfully false and fraudulent information. The short answer is that no information was required of petitioner and hence there obviously would be no applicable regulations. The Department of State did not seek information from petitioner. He volunteered it as part of a successful effort to persuade the Department to withdraw its official request that he resign his position in the Department. Having submitted information to the Department for the purpose of influencing its official action in a matter within the Department's jurisdiction, petitioner can hardly now be heard to urge that he did not know that the information was pertinent. His recognition of its pertinence is demonstrated by the fact that he submitted it on his own volition. The statute plainly told petitioner that criminal consequences attached to his willful submission of false and fraudulent information to the State Department. A regulation could have told him no more. Compare *United States* v. *Birdsall*, 233 U. S. 223, 230-231. Willful falsification in the State Department matter and in the prior proceedings is wholly inconsistent

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with petitioner's present suggestion of surprised innocence.

Petitioner also seeks to buttress his indefiniteness argument by the fact that the statements were not made under oath nor in a formal proceeding in which the statements were stenographically transcribed. But nothing in the Constitution so limits criminal responsibility. The argument that an oath should be administered as a condition to liability for false statements is not new. It was advanced by the petitioner in *Kay* v. *United States,* 303 U. S. 1,[33] and rejected by the Court without comment, the Court holding that Section 8(a) of the Home Owners' Loan Act, which closely resembles the pertinent clause of Section 35A, was not unconstitutionally vague and indefinite. Section 35A does not require an oath as an ingredient of the offense (*United States* v. *Dumas,* 288 Fed. 247 (E. D. N. Y.)), and since the statute punishes only willfully fraudulent statements there is no danger that an innocent mind would be misled by the absence of an oath.

Similarly, the fact that the statements, which petitioner admitted making (R. 177-179), were not stenographically transcribed when they were made presents no serious problem. Until the recent enactment of the Court Reporter Act (Sec. 5a of the Judicial Code, 28 U.S.C. [1946 ed.] 9a, now 28

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[33] See Brief for Petitioner, pp. 28-29, and Brief for the United States, pp. 31-32, 48, No. 61, Oct. T. 1937.

U.S.C. 753), many federal court proceedings, even in criminal cases, were not stenographically transcribed. See *Miller* v. *United States*, 317 U. S. 192, 197-199. Reducing important statements to writing when they are made is a convenient method for later establishing what was said, but nothing in the Constitution makes that the exclusive mode of procedure or proof.

It is idle to urge, as petitioner does (Br. 29-30), that the interview was not in conformity with regulations providing for the hearing of charges against employees. Petitioner previously had had such hearings before the Civil Service Commission (see, *supra*, pp. 6-7). When he was requested to resign, he neither wanted nor sought another hearing. Instead, he desired a conference with the executive of the Department responsible for the request. Having obtained precisely what he sought, he is hardly now in a position to complain that the procedure which he selected should not have been pursued. But, in any event, he may not excuse the willful making of false and fraudulent statements by attacking the validity of the proceeding in which they were made. In the words of this Court, "When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction."

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Kay v. *United States,* 303 U. S. 1, 6-7, and cases cited; see also *United States* v. *Meyer,* 140 F. 2d 652, 655 (C.C.A. 2).

Petitioner's effort to characterize his conference with Mr. Panuch in terms of a friendly, casual conference between two employees of the Government who were not on notice of the significance of what was being said finds no support in the testimony of Mr. Panuch, which must be accepted at this stage of the litigation. *Glasser* v. *United States,* 315 U. S. 60, 80. It will be recalled that petitioner knew, long before he made the statements in question, that there was a serious question concerning his suitability for employment because of evidence that he had been a member of the Communist Party while using the name Tony Whales. It is evident that when petitioner was requested to terminate his position with the State Department he knew the reasons for the request. He did not seek any formal hearing in an effort to have the request withdrawn. Instead he went to the Deputy Assistant Secretary for Administration, Mr. Panuch, who had determined that petitioner was not suitable for employment in the State Department, and sought to persuade that official that the charges against him were untrue. It is evident from the testimony concerning the conference that it was not a casual one in which no one realized that the stakes were high. Mr. Panuch testified that at the opening of the discussion he informed petitioner

that he had authorized the request that petitioner resign, and that there were "substantial" security reasons for the request (R. 48-49). Then Mr. Panuch detailed the charges against petitioner and petitioner, in turn, specifically denied each one (R. 49-50), stating, *inter alia,* that "I am not and never was a member of the Communist Party" and that "I was never known as Tony Whales" (R. 50). Petitioner referred Mr. Panuch to the findings in the earlier Civil Service investigation; to his religious background as evidence that he was not a Communist; and he sought to persuade him that the charges resulted from the fact that the personnel of the Security Office of the State Department "were a bunch of country boys who didn't know the difference between a Communist, a liberal, an anarchist, and a Socialist" (R. 51-52).

That Mr. Panuch regarded the matter seriously, and not as mere casual inter-office conversation, is shown by his testimony that the conference lasted over two hours and "was in the nature of an appeal." In Mr. Panuch's words, "the man was appearing before me as Deputy Assistant Secretary, and he was entitled to have his day in court, and we just threshed the matter out thoroughly" (R. 52).

The short of the matter is that petitioner sought an interview with Mr. Panuch, with whom he testified he had "a good personal relationship" (R. 176), for the purpose of persuading that officer that

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he was not a security risk. That his denials were persuasive is demonstrated by the fact that the request for petitioner's resignation was withdrawn until several months later, at which time the extremely damaging information that Detective Drew had obtained first became known to the State Department. Thus, false statements which enabled petitioner to retain his position in the State Department are the basis for his conviction. They were made for the purpose of influencing the decision on an official matter in the Department of State. In no sense were they innocent misstatements of fact attributable to a pure motive.

IV

The contention that the trial judge excluded competent evidence solely because it involved "Negroes and Negro organizations" and the jury had among its members nine Negroes is utterly without support in the record.

Petitioner's final contention is that "the trial court excluded relevant, competent, material and important evidence, involving Negroes and Negro organizations, solely because of the supposed inability of the predominantly Negro jury in the case to weigh such evidence on the same terms as any other representative jury" (Pet. 33-34; see Br. 77). Accordingly, he argues that he was denied a fair trial before a representative jury (Br. 107). In support of this contention, petitioner refers to three incidents in the course of the trial as showing that

the court used the inappropriate rule of exclusion which he ascribes to it.

The same contention was urged in the court below and was extensively considered and rejected, both because the reason for the trial court's rulings was not that which petitioner suggests and because there was no improper exclusion of evidence tendered by petitioner. We agree with the court below on this issue, but in view of the nature of the contention we deem it appropriate to set forth in detail the three incidents upon which petitioner relies, in order that the total lack of basis in the record for petitioner's contention may be made plain.

A. *The police brutality incident.*—In the course of the presentation of the Government's case, one Harper testified that he had met petitioner in the fall of 1940 (R. 72); that in May 1941 he attended a meeting at petitioner's home (R. 76); that the meeting was attended by representatives of the National Negro Congress and executives of the Communist Party in the New York area (R. 76); that the meeting was concerned with difficulties experienced by the Congress because of Communist participation in the organization (R. 76-77); that petitioner attended the meeting as a representative of the Communist Party (R. 78); and that petitioner actively participated in the meeting (R. 77).

In the course of petitioner's testimony, he stated

that Government witness Harper "was a good friend of mine" (R. 185), and that he met him in 1940 at his home through his wife (R. 185). Then the following occurred (R. 186):

By Mr. Ford [petitioner's counsel]:

Q. How do you happen to recall that Harper was at your house on this occasion?

A. * * * The specific thing that recalled it to me was that there had been an accident—incident—at that time around the East Side of which there must be a record in the police files, concerning the beating up of two Negroes; two Negroes and a scout car were involved—

The Court. Just a minute, sir. We are not interested in that.

Mr. Ford. I am now establishing the fact of how he happens to recall back seven years ago of this meeting and the meeting with Harper at his house.

The Court. Yes, sir, and it could have other purposes, Mr. Ford.

Suppose you come to the bench.

Mr. Ford. All right.

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice as follows:)

The Court. I do not think we are interested in an outbreak here about the Secretary of

> State and the FBI, sir.[34] We do not want that to occur again.

The colloquy continued at the bench (R. 186-187) and in the course of it petitioner's counsel sought to explain the relevance of the proposed testimony concerning the beating of two Negroes, as follows (R. 187-188):

> Mr. Ford. Well, he is going to testify that * * * when he came home, that is what they were talking about, and he advised Harper that the way to do that was that if Harper believed that, to write the Police Commissioner and submit the names, because he felt that the Commissioner would take care of anything that was wrong. And that is first how he remembers meeting the witness Harper, who is a witness against him, and secondly, those were the circumstances, and that was not a Communist Party meeting. * * *

There was further discussion and then interrogation of petitioner resumed, as follows (R. 189-190):

> Q. Now, at that time that time that Harper was at your house, were there other people present?
>
> A. Yes, sir.
>
> Q. And was there a discussion going on at

[34] The court's reference was to an incident which had occurred a few moments earlier in which petitioner had suggested from the witness stand that certain officials of the State Department and the Director of the Federal Bureau of Investigation "leaked" information to newspaper columnists. Petitioner's counsel conceded at the trial that such comments were unnecessary to the case. (R. 177.)

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the time when you arrived at your house from N.Y.U.?

A. Yes, there was.

Q. And—

Mr. Ford. Your Honor, I do not see how I can ask it except to bring out the discussion.

The Court. All right, sir. [Italics supplied.]

By Mr. Ford:

Q. And after that discussion regarding certain incidents that happened in the neighborhood, was it?

A. That is correct.

Q. And you talked it over with Mr. Harper and the others?

A. That is right. I said that I was sure—

Q. What did you say to do about it? Do not say what he was writing about, but say what you told him to do about it.

A. I told him I was sure the Police Commissioner would not like what had taken place; would not condone such actions, and I suggested that a letter be drawn up by whoever was there as witnesses, and the neighborhood people, to draw up such a letter and send it.

Q. Now, at that time, was that a meeting of the Communist Party, or was there anything mentioned on that occasion when Harper was at your house about communism?

A. No, sir.

In our view, the above excerpts from the record show beyond question that the evidence which pe-

titioner sought to adduce in this instance was admitted. Compare petitioner's counsel's statement of what petitioner would testify to with his testimony last quoted (*supra*, pp. 76-77). It is true that the details of the incident in which the two persons were beaten were not developed, but we perceive no relevance in such facts, and we do not understand petitioner to contend otherwise. The whole purpose of the testimony, according to petitioner's counsel, was to show how petitioner recalled the incident of seven years before and to show that the subject of the meeting in petitioner's home was not Communism. This was shown by petitioner's reference to the beating and his advice to the persons at the meeting on how to deal with the situation and by the testimony that nothing was mentioned about Communism. The details of the beating, of course, would have cast no light on either of these matters.

Petitioner's argument that the trial judge's rulings in this regard were based on extra-legal considerations is belied by the judge's explanation of the reasons for his rulings. Thus, when petitioner's counsel was summoned to the bench, the trial judge told him that he was anxious that petitioner should not use the witness stand for prejudicial outbursts (R. 186-187, 188). It was this desire to avoid uncalled for and prejudicial outbursts from petitioner which underlay the trial judge's painstaking effort to limit the testimony to rele-

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vant evidence. And, significantly, when petitioner's counsel persisted in his claim that it was necessary for him to ask petitioner concerning the subject matter of the meeting at his home, the trial judge, recognizing the claim of relevance, said, "All right, sir" (R. 190).

Instead of being criticized for his action, the trial judge, more appropriately, is entitled to commendation for his conscientious effort to confine the evidence on both sides to the issues in the case.

B. *Cross-examination of Detective Drew.*—The short answer to petitioner's argument that the trial judge improperly limited his cross-examination concerning Detective Drew's participation in activities of the National Negro Congress is that the court expressly authorized petitioner to cross-examine Drew as to any matter brought out in the direct examination. Thus, when the trial judge told petitioner's counsel that the cross-examination was going beyond the issues in the case, the following colloquy occurred (R. 125):

> Mr. Ford. May I have an exception on this limitation for cross-examination?
>
> The Court. Yes. I understand from the pleadings that the issue in this case is whether or not certain statements were made knowingly and willfully and falsely.
>
> Mr. Ford. What I have to say, your Honor, I will assume that is correct, and had the Government had that realization and limited their testimony to that realization, I would not have

attempted any of this cross-examination, but what I am trying to cross-examine him about is all of the things the Government put into this case and discussed in this case, by witnesses in front of the jury, and it is only because of the fact that I think he went outside of it, that I should be permitted to go outside of it.

The Court. *I agree with you, and the Court will permit you to go into anything which was brought out on any of these occasions as to which there is testimony, sir.* [Italics added.]

Mr. Ford. And I also offer these questions to question his credibility, as a basis for testing his credibility.

The Court. I will not go into that. I will permit you to go into and attack his credibility as to anything that he has dealt with on those particular occasions.

I agree with you that we have gone afield, sir, and *I agree with you that you can go to the extent of meeting those situations, but only as to those.* [Italics added.]

That petitioner did cross-examine Drew with a view to showing the nature of his participation in the National Negro Congress is demonstrated by the following questions and answers on cross-examination (R. 123):

Q. Did you organize or help to organize a branch of the National Negro Congress in New York? A. I did, sir.

Q. And who, if anyone, helped you organize

that branch? A. Louis Harper, George Smith, Beatrice Smith, Harry Palmer.

Q. And what date was that that you organized that branch? A. I don't know the exact date, sir.

Q. Will you give me approximately the date? A. I think it was around September of 1940.

Q. And were you one of the original organizers? A. Of the East Side Council; yes.

Q. Of the National Colored Congress? A. Of the East Side Council; yes.

Q. Of that branch? A. Yes.

Q. Did you solicit memberships for that Congress? A. I did.

Q. And did you solicit that membership from the area around in the East Side; the lower East Side? A. I did.

Here again, the record shows that the trial judge's rulings were based solely on the relevance of the information sought by petitioner on cross-examination. That there was no abuse of discretion in limiting cross-examination is demonstrated by the trial judge's express statement to petitioner's counsel that he would be permitted to inquire into any matter which was brought out on the direct examination. Nothing to which petitioner refers suggests, in any manner, that the trial judge used any other test in ruling on the admissibility of evidence.

C. *The evidence concerning the objects of the National Negro Congress.*—Petitioner's final ar-

gument is that the trial court improperly refused to permit him to inquire on cross-examination of witnesses Harper and Drew concerning the purposes, objects and organization of the National Negro Congress (Br. 101)

The primary incident appears at pages 79 to 81 of the record, as follows:

> Q. I would like to have you [Harper] list some of the purposes of the National Negro Congress; what its objects were. A. In the founding of the National Negro Congress it was felt that there was not a militant enough organization representing the aspirations, desires, the well-being of the Negro people in the United States. Negro Congress was formed in 1932.
>
> At that time the most vocal organization of the Negro people was the National Association for the Advancement of Colored People.
>
> That was a period of great economic stress, the height of the depression. And many Negroes had come to feel that the NAACP was not militant enough as it had been in previous years, and so a call was sent out calling all organizations, Negroes, trade unions, churches, lodges, and friends of the Negro people, to come to a founding convention that was held in Chicago.
>
> Q. At that time when that call was sent out to the different organizations you have enumerated, like the churches and all, there was a response from those organizations, was there? A. That is right. They came together in Chi-

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> cago in 1936, and we had a three-day convention in the big Eighth Regiment Armory.

At this point, after witness Harper had quite fully stated his understanding of the objects of the organization, the trial judge summoned counsel to the bench and cautioned counsel that he could inquire into matters relating to "the tie-in" with the Communist Party and to a specified meeting concerning which there had been testimony on direct examination, but that "we are not going into the organization and desires and aims of this Congress" (R. 79-81).

In view of the fact that the witness, on cross-examination, had extensively stated the purposes and objects of the National Negro Congress before the trial judge interceded, we have difficulty in perceiving how petitioner was hurt by the court's statement to counsel that it was unnecessary to inquire into this subject. The testimony already was before the jury. But apart from this, petitioner makes no showing that an inquiry into the objects of the National Negro Congress could have any possible relevance to the issues on trial. The court below was unable to see the relevance of this proposed line of inquiry, and neither do we.

In sum, the basic infirmity in petitioner's contention is that the rulings of the trial court were predicated on the accepted standards governing the admissibility of evidence. Nothing in the record justifies petitioner's present argument that con-

siderations of race and color controlled or even influenced the rulings on the admissibility of evidence. Indeed, petitioner's counsel did not even suggest to the trial judge that he so interpreted the rulings. It was only when the case reached the appellate court and the quest for reversible error was in high gear that the present contention was conceived. Since that contention is not supported by anything in the record, it necessarily fails.

CONCLUSION

We therefore respectfully submit that the judgment of the court below should be affirmed.

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NOVEMBER 1948.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 59

CARL ALDO MARZANI, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

On pages 52–62 of the Government's Brief it is argued that evidence of the making by the petitioner of the statements involved in the first nine counts of the indictment was admissible under counts 10 and 11, to explain the circumstances and to show that the petitioner acted wilfully. We indicated that the petitioner could have requested (which he did not do) an instruction that the jury consider such evidence only on the issue of petitioner's purpose and intent. We also indicated that such evidence had significance in relation to the intent question (Br. 58).

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These statements, however, are subject to some amplification, since the evidence of the making by the petitioner of the statements involved in the first nine counts was relevant under counts 10 and 11 for other reasons. We desire, without detracting from the admissibility of such evidence on the question of willfullness or intent, to direct the Court's attention to these other reasons.

During the course of his interview with Mr. Panuch, Deputy Assistant Secretary of State, on June 1, 1946, at which time he made the false statements on which counts 10 and 11 of the indictment are based, the petitioner, as part of his denial of the charges described by Mr. Panuch, and as "proof" of his claimed innocence, cited the previous investigations made by the F. B. I. and the Civil Service Commission. The Government witness and the petitioner corroborate each other on this point. (See R. 50, 51, 179.)

Up to that time Mr. Panuch had never heard of the Civil Service Commission proceedings with respect to the petitioner (R. 51). Within two weeks from the date of the interview with petitioner, Mr. Panuch asked the Civil Service Commission for the file and record in the Marzani case, and "read it very carefully" (R. 53).

So the fact is that the petitioner himself made the entire record of the Civil Service Commission in his case, including the petitioner's false statements to the F. B. I. and the investigator of the Commission, an inseparable part of his false

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statements to Mr. Panuch. In addition, the petitioner asked Mr. Panuch to read a book of evidence on the subject he said he had presented to the Civil Service Commission (R. 57, 179).

And, after reading the Civil Service Commission's file, Mr. Panuch, sometime in July or the early part of August, 1946, told the petitioner "It's O. K." (R. 59). He testified he told the petitioner that "so long as Russell and I (Panuch) were around, there would be no persecution" (R. 60).

It is clear from the record that the petitioner, having succeeded through the false statements which are the basis of counts 1 to 9, inclusive, of the indictment in obtaining and retaining employment by agencies of the Government, again succeeded in June, 1946, through his false statements to Mr. Panuch, and by including the false statements in the Civil Service Commission file, in having the State Department's request for petitioner's resignation withdrawn. And so the evidence admitted under counts 1 to 9, inclusive, would be admissible and relevant under counts 10 and 11 alone, if necessary, as part of the statements made to Mr. Panuch on June 1, 1946, and on which action favorable to the petitioner was taken.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

NOVEMBER 1948.

U. S. GOVERNMENT PRINTING OFFICE: 1948

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v.

UNITED STATES OF AMERICA, *Respondent*.

BRIEF OF THE NATIONAL LAWYERS GUILD AS AMICUS CURIAE.

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STATEMENT.

The National Lawyers Guild is a Bar Association with members throughout the United States and chapters in many important cities. It is pledged "to protect and foster our democratic institutions and the civil rights and liberties of all the people." It believes that this case raises issues having a significant bearing upon the vitality of the American concept of due process.

The petitioner has been found guilty under a statute which punishes ". . . whoever shall knowingly and wilfully . . . make or cause to be made any false or fraudulent statements or representations . . . in any matter

within the jurisdiction of any department or agency of the United States . . ." (Tit. 18 U. S. C. A. [1940 ed.] sec. 80). He has been sentenced to a term of from one to three years. The indictment contained eleven counts; the convictions on nine have been reversed by the Court of Appeals. The remaining two counts arise out of statements allegedly made by petitioner in the course of a completely informal conversation with his immediate superior in the State Department.

The National Lawyers Guild is of the opinion that statements made by one person in government employ to another during the course of an informal conversation cannot be brought within the purview of the statute without doing violence to every precept of due process. Should this conviction be affirmed, then a substantial portion of the safeguards our judicial traditions have erected to protect those accused of crimes will be lost. Guilt will no longer be a matter of conscious wrongdoing but of fortuitous circumstance.

Because it holds these views, the National Lawyers Guild has secured the consent of the parties to the filing of this brief as amicus curiae.

ARGUMENT.

As Construed and Applied, the Statute Deprives the Petitioner of His Liberty Without Due Process.

In April, 1946, Marzani was asked for his resignation. One month later, he had an interview with Panuch at which the requested resignation was discussed (J. A. 48). No one else was present; no record was kept (J. A. 48, 55.) The conversation was kept on an informal note; Panuch addressed the petitioner by his first name (J. A. 49). It was the kind of talk two friends might have if one has a problem. Only toward the end of his direct testimony did Panuch think to describe the conversation as ". . . in the nature of an appeal from Fearing's request" for Marzani's resignation (J. A. 52).

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The Nature of the Crime Charged.

The crime with which the petitioner is charged consists of "knowingly and wilfully" making false statements as to matters within the jurisdiction of an agency of government. Even a statute as loosely phrased as this must recognize limits of application. At the very least proof is required showing that the defendant knew or should have known that his statements were being made to one who was then acting as an agent of the United States. *United States* v. *White*, 69 Fed. Supp. 562 (S. C. Cal. 1946). If the defendant did not know that the person to whom he spoke was in fact acting as such a representative, then the requisite intent is not established.

> "The statute is not intended to include and make criminal a possession which is not conscious and willing. While its words are general, they are to be taken in a reasonable sense, and not in one which makes manifest injustice or infringes constitutional safeguards." *Baender* v. *Barnett*, 255 U. S. 224, 225, 226 (1921).

There is a substantial difference between a knowing falsehood, and the falsehood with which the petitioner is charged. Ordinarily a misstatement of fact is not criminal. If it be under oath it may constitute perjury; if it be made in the course of the transaction of business with the Government it invites prosecution under Section 80. But in either case there must be proof that the essential element of the crime is present—that the oath was knowingly taken or that the defendant was conscious that he was dealing with a representative of an agency of government acting in his official capacity.

The Prosecution Must Prove Specific Intent.

Prosecutions under Title 18, U. S. C., sec. 52, the civil rights statute, which punishes those who, under color of state law or authority, deprive persons of federally pro-

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tected rights for reasons of color or race, pose problems similar to that presented by this record. The crime there is "wilfully" to subject a person to the deprivation of his civil rights. It has been held that proof merely that state officials caused the death of a prisoner before his trial was not sufficient to support a conviction under Section 52 without a finding of specific intent to deprive him, by that means, of a fair trial.

> "We repeat that the presence of a bad purpose or evil intent alone may not be sufficient. We do say that a requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law saves the Act from any charge of unconstitutionality on the grounds of vagueness." *Screws* v. *United States,* 325 U. S. 91, 103 (1945).

Without this specific intent, the court found, the statute might be invalid for indefiniteness. For then any action, no matter how conceived, which led to the denial of a federal right, might be punishable as a crime, *ibid,* 97.

The closeness with which this reasoning bears upon the case at bar should be apparent. Unless the statute is applied in such a way that proof of a specific intent to deceive an agent of government acting in his official capacity is made necessary, then anyone who speaks to a governmental employee, no matter for what reason and under what circumstances, may be found guilty of a crime. A dangerous device would thus be created through which those holding unpopular views could readily be eliminated. Indeed, it is difficult to examine this record without forming an opinion that the petitioner would not have been prosecuted but for his political views.

By its own admission the government had all the evidence against Marzani in its possession as early as 1944 (J. A. p. 68). It is very probable that it had this information even earlier in 1942 and 1943 (J. A. 244, 246, 248). Yet despite this no action was taken against Marzani. On the contrary his talents and training were employed in the

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most difficult and confidential tasks. In 1945 he was sent abroad for the Office of Strategic Services (J. A. p. 174). Upon his discharge from the Army, he was not only rehired but promoted to important posts within the State Department. Assuming that Marzani made the misstatements charged it is not contended that the United States was in any way prejudiced thereby. Yet the essence of the crime charged is fraud and deception. Under these circumstances there is only one logical explanation for this prosecution. It could serve to silence one who had spoken out for fundamental political, social and economic change. It is the vagueness and loose construction of the statute here which makes possible such a misapplication of our criminal law.

On the record here it does not appear that the petitioner realized, or should have known, that he was speaking to Panuch in an official way and not discussing a problem with him informally. In our view a proper construction of the words "wilful" and "knowing" precludes a conviction based upon such a conversation.

> "The word often denotes an act which is intentional, or knowing or voluntary, as distinguished from accidental. But when used in a criminal statute, it generally means an act done with a bad purpose." *United States* v. *Murdock*, 290 U. S. 389, 394 (1933).

The "bad purpose" in this case can only be the deliberate effort to deceive a representative of the United States in the course of the performance of his duties. It is this which the statute undertakes to punish. A falsehood told to Panuch as a private individual is obviously not the same as one told him as an official of the State Department acting in his official capacity. A wilful failure to pay income tax is not enough to establish the intent to attempt to evade the tax, *Spies* v. *United States*, 317 U. S. 492, 498 (1942). Thus a wilfully false statement to Panuch is not enough to prove a wilfully false statement to the Department of State. Confusion of the two can only lead to that degree of vagueness which will invalidate the statute.

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"The Court, indeed, has recognized that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. The constitutional vice in such a statute is the essential injustice to the accused of placing him on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning. . . . But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Screws* v. *United States, supra,* 101, 102.

The Statute as Applied is Invalid for Indefiniteness.

The charge to the jury did not observe these precepts. So far as he dealt with questions of knowledge and intent at all, the trial judge referred only to the truth or falsity of the statements made by the petitioner. As he summarized the elements of the crime, it was not necessary that the jury find that Marzani intended to speak to Panuch in the latter's official capacity:

"It is incumbent upon the Government, as I have heretofore said to you, to prove all the essential elements of the crime charged. Briefly, these elements are:

1. That the defendant made the statements charged.

2. That the statements were false.

3. That the false statements were made wilfully, knowingly, and fraudulently." (J. A. 43).

Fraudulently was defined as "a deliberately planned purpose and intent to deceive and thereby gain an unlawful

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advantage" (J. A. 41). There was no attempt made to distinguish between a fraud upon Panuch as an individual and Panuch as an official of the State Department. The definition was in broadest possible terms and made it possible for the jury to conclude that no distinction need be made.

From this, the jury could well have concluded that if they were satisfied that the statements made by Marzani were knowingly false and that Panuch was in fact an agent of the United States and was or could have been misled by the falsehood, the petitioner was guilty, without regard to whether he intended to discuss his problem with Panuch in the latter's official capacity or not.

Such a construction of the statute does more than depart from the commonly accepted norms of criminal trials; it denies the petitioner due process. Under it, the petitioner's intent is without significance. Whether he was merely enlisting the sympathy of a man he supposed a friend or deceiving an official of the government is immaterial. A statute, which punishes equally an act innocent of intent to commit a fraud upon an agent of government and an act deliberately designed to that end, can not be deemed to provide the standard of guilt which due process requires. *Herndon* v. *Lowry*, 301 U. S. 242, 259 (1937).

Petitioner's motion for dismissal of the indictment, renewed in his motion for judgment of acquittal, should have been granted as to the last two counts, because it is apparent that the statute, as applied, fails to meet the requirements of constitutional definiteness. Under the indictment and the facts as shown by the record, even a proper instruction as to knowledge and wilfulness could not have supplied the requirements as to which all evidence was lacking, that petitioner's statements were required or that his obligations were defined.

This Court has considered the dangers inherent in the enforcement of the statute here involved, and while it sustained the indictment, it did so with an implied warning, singularly germane here:

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> "Nor can the statute be deemed to be invalid because of indefiniteness. The affidavits and reports required have been sufficiently described and the duty enjoined has been adequately defined. Any one presenting the required affidavits and reports to the Board set up under the pertinent regulations was suitably charged with notice of the consequence of knowingly and wilfully including therein any false and fraudulent statements." *United States* v. *Gilliland*, 312 U. S. 86, 91 (1941).

Here, petitioner's statements were not required, his duty was not defined, no warning of consequences was given. The statute as applied is invalid for indefiniteness.

CONCLUSION.

The judgment of conviction should be reversed and the case dismissed.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 59.

CARL ALDO MARZANI, *Petitioner,*

v.

THE UNITED STATES OF AMERICA.

PETITION FOR REHEARING AND OTHER RELIEF.

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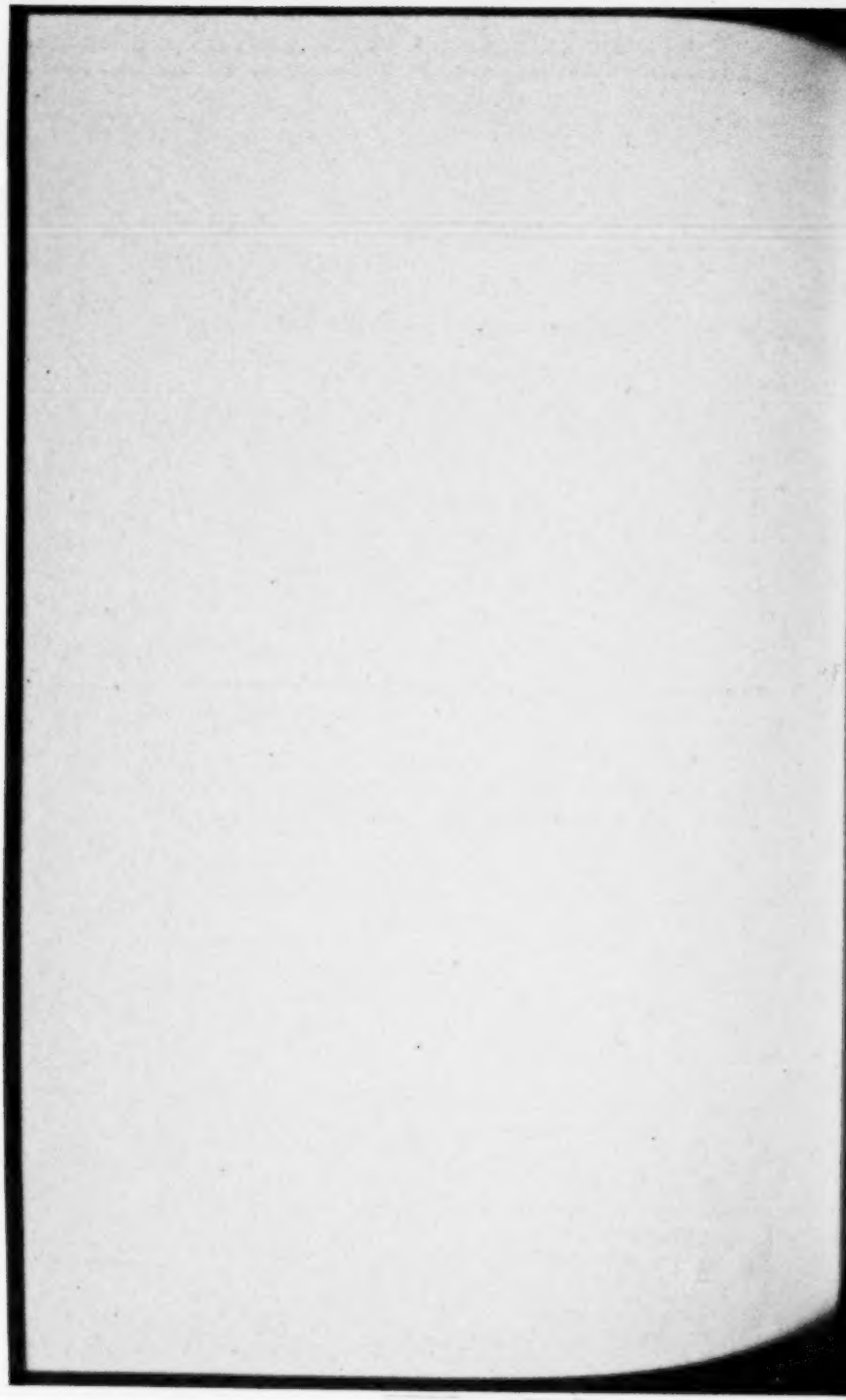

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 59.

CARL ALDO MARZANI, *Petitioner,*

v.

THE UNITED STATES OF AMERICA.

PETITION FOR REHEARING AND OTHER RELIEF.

Petitioner, Carl Aldo Marzani, respectfully presents his petition for rehearing and other relief, pursuant to the Rule 33 of the Rules of this Honorable Court, and submits the following reasons why his prayers should be granted:

I.

Petitioner was convicted of eleven separate violations of the False Claims Act (18 U. S. C. Sec. 80, now Section 1001). The court below held that prosecution of the first nine counts of the indictment was barred by the statute of limitations (R. 274-276, 277) but affirmed the judgment of the District Court on the ground that no prejudicial error was committed and that the sentence, which was general, could

be sustained on the remaining two counts, which it held good.

The questions presented by the petition for certiorari were:

(1) Whether the False Claims Act was applicable, and if applicable, constitutionally valid, as applied, in the prosecution of the false statements in Counts X and XI of the indictment.

(2) Whether the inclusion as issues on the trial, the admission of evidence, the instructions to the jury and the imposition of sentence relating to eleven counts of the indictment deprived petitioner of constitutional rights and substantially prejudiced him, in view of the holding, on appeal, that the first nine of the eleven counts were erroneously included in the indictment and erroneously submitted to the jury because barred by the statute of limitations.

(3) Whether petitioner was deprived of an impartial trial by a representative jury, by reason of the application by the trial court of a unique standard for the exclusion of admissible evidence, based on the trial court's apprehension that the predominantly Negro jury in the case could not consider the evidence on the same basis as any other representative jury.

Further questions raised by the government's brief on the writ and at oral argument before this Court were:

(4) Whether the decision of the court below, holding that the first nine counts of the indictment were barred by the statute of limitations, correctly construed the Suspension Act (18 U. S. C. Sec. 590(a)(1), now Sec. 3282), in view of the conflicting decision in *United States* v. *Gottfried*, 165 F 2d 360 (C. C. A. 2, 1948) cert. denied 333 U. S. 860.

(5) Whether the government, having opposed the granting of the petition for certiorari on all eleven counts, had standing to support the judgment on the last two counts

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by urging the reversal of the judgment below on the first nine counts.

In its Per Curiam Order of December 20, 1948, this Court affirmed the judgment of the court below, by an equal division, without opinion, Mr. Justice Douglas not participating in the consideration or decision in the case.

There has thus been no decision in the case, and no judgment has been announced authoritatively establishing any principle for the interpretation of the False Claims Act, the Suspension Act, and the constitutional and statutory provisions in respect to the questions presented. *Etting* v. *Bank of United States*, 24 U. S. 11; *Hertz* v. *Woodman*, 218 U. S. 205; *Hanifen* v. *Armitage*, 117 Fed. 845; *Lambros* v. *Young*, 145 F. 2d 341.

II.

This Court early in its history adopted the practice of requiring, if practicable, constitutional questions to be heard by a full court in order that the judgment in such case might, if possible, be the decision of the majority of the whole court.

In *Briscoe* v. *Commonwealth Bank of Kentucky*, 33 U. S. 8 Pet. 118 and *New York* v. *Miln*, 33 U. S. 8 Pet. 120, when the full Court consisted of seven members, this rule was announced by Chief Justice Marshall in the following language:

> "The practice of this court is, not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four judges concur in opinion, thus making the decision that of a majority of the whole court. In the present case four judges do not concur in opinion as to the constitutional questions which have been argued. The court therefore direct these cases to be reargued at the next term, under the expectation that a larger number of the judges may then be present."

The same cases were again called at the next term of court and the Chief Justice said the court could not know

whether there would be a full court during the term; but as the court was then composed the constitutional cases would not be taken up. 34 U. S. 9 Pet. 85. The rule laid down by Chief Justice Marshall has been frequently followed. See e. g. *Home Ins. Co. of New York* v. *New York*, 119 U. S. 129, 148, 122 U. S. 636, 134 U. S. 594, 597; *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, 586, 158 U. S. 601.

Nor has the rule been limited to cases of equal division, as a result of the illness of one of the justices, or a temporary vacancy, where the court could expect that a sufficient number of justices would ultimately be present to render a decision by majority vote. It has also been given effect in the analagous situation where so many of the justices disqualified themselves that the Court, because of the absence of a quorum, could not make final disposition of the case. Thus, in *United States* v. *Aluminum Company of America* and *North American Company* v. *Securities and Exchange Commission*, 320 U. S. 709 (1943) this Court said: "As four justices have disqualified themselves from participating in the decision in each of these cases, the court is unable to make a final disposition of them because of the absence of a quorum of six justices as prescribed by 28 U. S. C. A. Sec. 231 . . . These cases will accordingly be transferred to a special docket and all further proceedings in them postponed in each case until such time as there is a quorum of justices qualified to sit in it." Subsequently, one of the justices who had disqualified himself reconsidered his disqualification and participated in the decision in the *North American* case, which was ultimately decided by the Court with three of the justices who had previously disqualified themselves not participating in the decision. 327 U. S. 686, 711 (1946).

Similarly, the rule of disqualification has yielded to the necessity of decision in cases where the disqualification of the justices would prevent a determination of the proceedings. *Evans* v. *Gore*, 253 U. S. 245, 39 A. L. R. 1476; *Hirota* v. *MacArthur*, — U. S. —, decided December 6, 1948.

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III.

Mr. Justice Douglas did not participate in the consideration or decision in this case. As it turned out, his non-participation, the other justices being equally divided, led to the affirmance by the Court, without opinion, of the judgment below, and the resulting absence of decision or clarification of the constitutional and statutory questions presented.

Mr. Justice Jackson, although not present at oral argument either on December 8, or 9, 1948, participated in the decision in this case, with the resulting equal division of the Court.

In Mr. Justice Jackson's statement, concurred in by Mr. Justice Frankfurter, in the *Jewell Ridge Coal Corporation* case, 325 U. S. 897, it was said that a question relating to the qualification of one of the justices to take part in the decision of the cause is one which cannot properly be addressed to the Court as a whole, but should be addressed to the individual discretion of the justice involved. For this reason, the following suggestions are made both to this Honorable Court as a whole and to Mr. Justice Douglas and Mr. Justice Jackson, individually:

To Mr. Justice Douglas:

The Per Curiam Order of the Court in this case does not disclose the reasons for Mr. Justice Douglas' non-participation. Whatever those reasons may be, petitioner is completely satisfied that if Mr. Justice Douglas were to reconsider his non-participation and agree to hear and decide this case, petitioner would be accorded a scrupulously fair hearing and decision and, therefore, unconditionally and unqualifiedly waives any possible objection that might be raised to such participation. The outcome of such participation would necessarily result in a decision in this case by a majority vote. Petitioner suggests that the reasons which led the justice who disqualified himself in the *North Ameri-*

can case, *supra,* to reconsider his disqualifications and subsequently to participate in the decision in that case in order to meet the requirements of a quorum and the reasons which led to the Court as a whole in *Evans* v. *Gore, supra,* to take jurisdiction of the case, despite the individual relationship of members of the Court to the question there involved are equally applicable to a reconsideration by Mr. Justice Douglas of his non-participation in this case, in order to enable the court to decide the questions presented by majority vote. Petitioner, therefore, respectfully moves Mr. Justice Douglas to reconsider his non-participation and to agree to hear and participate in the consideration and decision of this case.

To Mr. Justice Jackson:

In the Japanese cases, (*Hirota* v. *MacArthur,* decided December 6, 1948) Mr. Justice Jackson stated " . . . it may be that fuller argument and hearing will convert one or more of the Justices on one side or the other from the views that have equally divided them in the German cases . . . I would not want to be responsible for eliminating even a faint chance of avoiding dissents in this matter."

The considerations which led Mr. Justice Jackson to cast the deciding vote in the Japanese cases are, we suggest, grounds upon which he may be moved to cast his vote to permit rehearing in this case. His absence from the oral argument in this case on December 8 and 9, 1948, deprived him of the opportunity to hear the oral presentation of the case by the parties, and thus deprived the parties of the opportunity to convert him, and through him, in the councils of this Honorable Court, one or more of the justices on one ~~said~~ side or the other from the views that have divided them. The function of oral argument is real and practical. See *State* v. *City of Milwaukee,* 157 Wis. at 511-2, 147 N. W. at 52-53. Wiener: Oral Advocacy, 62 Harv. L. Rev. 56 (1948) In cases where the Court is equally divided, oral argument may be critical, especially if the equal division of

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the Court turns on the vote of one justice who has not heard the argument. In cases where the opportunity for argument has been wholly denied, although the briefs are considered, the United States Court of Appeals for the District of Columbia has recently held: "*Dartmouth College* v. *Woodward*, 4 Wheat 518, 581 (U. S. 1819) (Webster's argument) and *Galpin* v. *Page*, 18 Wall 350, 368 (U. S. 1873) cited in the Wilson case, sufficiently attest that an essential element of due process is an opportunity to be heard before the reaching of a judgment, that judgment without opportunity to be heard is judicial oppression. *Londoner* v. *Denver*, 210 U. S. 373 (1908) *Morgan* v. *United States*, 304 U. S. 1 (1938) *Erie R. Co.* v. *Paterson*, 79 N. J. L. 512, 76 Atl. 1065 (1910), also cited in the Wilson case, attest that the due process guarantee of hearing includes an opportunity for argument". *W. J. R. the Goodwill Station Inc.* v. *F. C. C.*—App. D. C.—decided October 7, 1948 *L. B. Wilson, Inc.* v. *F. C. C.* —App. D. C.—decided April 12, 1948, 4 Pike and Fisher Radio Regulation 2001, 2056. In the practical, if not the constitutional sense, the lack of opportunity to make oral argument to one justice, whose subsequent participation in an equal division of the Court results in an affirmance, without opinion, on important constitutional and statutory questions presented, is, we submit, sufficient ground for the Court to grant, and for that justice to exercise his discretion to vote for a rehearing of the case.

If Mr. Justice Douglas agrees to reconsider his non-participation, Mr. Justice Jackson's vote to grant a rehearing will assure a decision by majority vote. If Mr. Justice Douglas refuses to reconsider his non-participation, there is still a likelihood that, if the Court grants and Mr. Justice Jackson hears the reargument, a decision may be reached by majority vote. The important reasons of policy which led to the adoption of the rule in the *Briscoe* and *Miln* cases, *supra*, which was followed in the *Home Ins. Co.*, *Pollock*, *North American* and *Evans* v. *Gore* cases, *supra*, are sufficient warrant for seeking that likelihood. See the

decisions of December 6, 1948 and December 20, 1948 in *Hirota* v. *MacArthur*.

For these reasons, we respectfully move Mr. Justice Jackson to agree to hear the case, and a majority of the Court to grant this petition for rehearing.

IV.

It is respectfully submitted that the case at bar imperatively requires the adoption of a rule which would lead to rehearing and final disposition of the case by majority vote of this Court. This case reached the Court by petition for certiorari, not on appeal. The review thus came to petitioner because at least four members of this Court deemed the specific questions presented to be of sufficient general importance to require decision by this Court. The Per Curiam Order of affirmance by an equally divided Court fails to supply that decision. Instead, it leaves the law in a state of confusion.

It is well settled that affirmance by an equally divided court concludes the parties but is not a precedent either in this Court or in the lower courts, that such an affirmance of one circuit court of appeals decision does not overcome the conflict with the contrary decision of another circuit and that each decision remains the rule in its own circuit. *Hertz* v. *Woodman*, 218 U. S. 205, *Hanifen* v. *Armitage*, 117 Fed. 845.

1. The Per Curiam Order of this Court leaves a conflict with respect to construction of the False Claims Act between the decision of the court below and the decisions of the Second and Fifth Circuits, and indeed in all other Circuits in which the question has been presented. It also casts doubt on the authority of the *Gilliland* case (312 U. S. 86) which all the lower courts have followed, with the exception, we submit, of the court below.

The court below held that the False Claims Act was applicable to punish false statements made in a private in-

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formal conference, even though such statements were not required by any law, rule or regulation (R. 292-293). The Government concedes that these statements were voluntary and not so required. "The short answer is that no information was required of petitioner and hence there obviously would be no applicable regulations. The Department of State did not seek information from petitioner. He volunteered it . . . " (Gov't. Brief, p. 68.)

In *Hamner* v. *United States,* 134 F. 2d 592, 595, one count of the indictment under the False Claims Act charged Hamner and others with concealment of tires. The decision of the Fifth Circuit was that Hamner's confederates "did make false bills and so fell afoul of Section 80" (The False Claims Act) but as to Hamner "we are referred to no regulation which required the tires to be kept at any particular place or exhibited to the Office of Price Administration. . . . This count charges no crime and should be stricken on demurrer". In *United States* v. *Presser,* 99 F 2d 819, 822 the Second Circuit approved the decision in *United States* v. *Long,* D. C. 14 F Supp. 29, dismissing an indictment under the False Claims Act, because "the weekly payrolls of the contractor were submitted by him voluntarily, when not required by law" (See other cases to the same effect in Petitioner's Brief, pp. 31-35).

The result is that false statements though made voluntarily, and not pursuant to any requirement in law, rules or regulations are punishable in the District of Columbia under the decision of the court below but are not crimes in any other circuit.

The decision of the court below with respect to the False Claims Act is, moreover, of the utmost importance in connection with the current loyalty investigation of the two million government employees, the hundreds of thousands of applicants for government employment, and the many millions of private citizens who deal with government agencies or are queried by government agents in connection with the loyalty program. The regulations of the Loyalty

Review Board, under Executive Order 9835 (12 Fed. Reg. 1935), the Hearing Procedures of the Personnel Security Board of the State Department, Rule XII and Departmental Circular 222 of the Civil Service Commission are all designed to avoid proved abuses in connection with loyalty investigations and to surround those investigations with as many procedural safeguards as were deemed feasible (See Petition for Certiorari pp. 17-20). The decision of the court below, which is applicable to the greatest number of persons involved in the loyalty program, is a complete negation of those safeguards. Under that decision, government employees who converse with their superiors on loyalty matters, outside the hearings to which they are entitled under the loyalty regulations, do so at the peril of going to jail, if they make false statements; and any false statement made by any person to a government employee on any "official" matter is punishable, under the decision of the court below, although the false statement is volunteered, and not required, in the kind of private, informal unregulated conversation for which petitioner was held punishable in the last two counts in this case. The likelihood of prosecutions for false statements made under these circumstances is not abstract. The Attorney-General has publicly announced his intention to use the False Claims Act, as construed by the court below, in additional prosecutions of the type of the Marzani case, as one method of proceeding against subversive groups.[1]

Also raised, and unresolved, is the important constitutional issue, arising from the undefined breadth of the statutory prohibition as applied in the last two counts (See *Winters* v. *New York*, 333 U. S. 507, Petitioner's Brief pp. 35-40).

2. The Per Curiam Order of this Court also leaves a conflict with respect to the Suspension Act between the decision

[1] Statement of Attorney General before the House Committee on Un-American Activities February 5, 1948, Department of Justice Press Release (p. 3).

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of the court below and the decision of the Second Circuit in the *Gottfried* case, *supra*. This conflict applies not merely to false statements made in respect to loyalty matters, but to the whole range of dealings by all persons with government agencies where false statements are made but no pecuniary or property loss to the government is involved. Under the decision of the Second Circuit in the *Gottfried* case, prosecutions may be had at least until December 31, 1949 for such false statements made as early as August 25, 1939. This results from the fact that the Act of August 24, 1942 suspended the running of the statute of limitations on crimes on which the statute had not already run—i. e. crimes committed on or after August 25, 1939—and the amendments to that Act continued the suspension until three years after the termination of hostilities in the present war. Since the President declared that termination on December 31, 1946 (12 Fed. Reg. 1), the suspension runs until December 31, 1949—a period of over ten years. Under the decision of the court below, however, prosecutions for such false statements are barred unless commenced within three years of the indictment. The result is that persons may be prosecuted in New York for crimes, prosecution of which is barred in the District of Columbia, and that until an authoritative resolution by this Court of this conflict is had, the government may fail to initiate timely prosecutions or persons who should not be prosecuted will be subject to the hardships of unnecessary criminal trials.

The Per Curiam Order of this Court also results in uncertainty in the administration of justice in connection with the treatment of juries in the District of Columbia (See Petitioner's Brief pp. 77-105 cf. *Frazier* v. *United States*, decided December 20, 1948); in the application of the "harmless error" rule, in connection with the admission of evidence of other irrelevant crimes (See Petitioner's Brief pp. 40-74); and in the practice before this Court of the Department of justice in seeking to support the judgment of the court below on the last two counts, by urging

reversal of the judgment of the court below on the first nine counts, although no cross petition for certiorari as to such counts was filed.

Notwithstanding the fact that the eight Justices who participated in the decision were upon first impression evenly divided as to the ultimate question of affirmance, it is hard to believe that they were evenly divided upon the many issues which the case presents. A number, if not all, of the issues, might be resolved by such further consideration as would be accorded by granting this petition for rehearing.

We submit that the questions which affect alike the liberty of petitioner and the administration of justice, in connection with the constitutional and statutory questions presented by the petition for certiorari, the government's brief, and the issues raised at oral argument are far too important to rest upon the cryptic line "Affirmed by an evenly divided court".

For the foregoing reasons, it is respectfully urged that this petition for rehearing and other relief be granted.

CERTIFICATE.

We, the undersigned attorneys for the petitioner above named, certify that the foregoing petition is presented in good faith and not for delay.

Respectfully submitted,

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DECEMBER 20, 1948.

Per Curiam Decision.

No. 59. MARZANI *v.* UNITED STATES. Certiorari, 334 U. S. 858, to the United States Court of Appeals for the District of Columbia Circuit. Argued December 8, 9, 1948. Decided December 20, 1948. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. *Osmond K. Fraenkel* and *Allan R. Rosenberg* argued the cause and filed a brief for petitioner. *Solicitor General Perlman* argued the cause for the United States. With him on the brief were *Robert S. Erdahl* and *Irving S. Shapiro*. *Belford V. Lawson, Jr.* filed a brief for the National Lawyers Guild, as *amicus curiae*, urging reversal. Reported below: 83 U. S. App. D. C. 78, 86, 168 F. 2d 133, 141.